

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
APPENDIX**

77 4079

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-4079

NEW YORK STATE COMMISSION ON CABLE TELEVISION,

Petitioner-Appellant,

-against-

FEDERAL COMMUNICATIONS COMMISSION AND UNITED
STATES OF AMERICA,

Respondents,

MANHATTAN CABLE TELEVISION, INC., and NEW YORK STATE
CABLE TELEVISION ASSOCIATION,

Intervenors.

ON PETITION FOR REVIEW OF AN ORDER
FEDERAL COMMUNICATIONS COMMISSION

SUPPLEMENTARY JOINT APPENDIX

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Assessments for Regulatory Expenses
by the New York State Commission
on Cable Television

To the Commission:

CSR-654

PETITION FOR DECLARATORY RULING

Pursuant to Section 1.2 of the Rules of Practice and Procedure, the Commission on Cable Television of the State of New York hereby requests a ruling declaring Section 817 of the New York State Executive Law consistent in all respects with Section 76.31(b) of the FCC's cable television rules.

Article 28 of the Executive Law establishes a comprehensive regulatory program applicable to cable television companies operating in the State of New York.* It also provides for the establishment of the Commission on Cable Television, the present petitioner. The Commission is generally responsible for the administration of Article 28 and

* A copy of Article 28 is annexed hereto as Appendix A.

has, among other specific functions, the task of promoting "the rapid development of the cable television industry" in New York State (Executive Law, Section 811).

Section 817 of Article 28 establishes a procedure by which the Commission's costs and expenses, which are defrayed in the first instance out of the State treasury, are reimbursed by the cable television industry. In essence, Section 817 provides that the Commission's expenses shall be allocated among the various cable television companies operating in the State in proportion to their gross receipts. Although the statute contemplates that all of the Commission's expenses will ultimately be borne by the industry, Section 817 protects cable operators against excessive assessments by providing that "[i]n no event shall the amount billed to or collected from any cable television company pursuant to this section exceed one percent of the gross annual receipts of such company. . . ." The full text of Section 817 is included in Appendix A, infra.

Section 76.31(b) of the FCC's Cable Television Rules provides in pertinent part as follows:

(b) The franchise fee shall be reasonable (e.g., in the range of 3-5 percent of the franchisee's gross subscriber revenues per year

from cable television operations in the community (including all forms of consideration, such as initial lump sum payments)).

Petitioner's expenses since its creation in January 1, 1973 have exceeded _____ percent of the "gross annual receipts" of all the cable television companies in the State. Accordingly, in implementing Section 817 the Commission has issued orders billing every cable television company at the maximum statutory rate of one percent of the company's "gross annual receipts." See General Order No. 3 and General Order No. 4, issued June 7, 1973 and February 25, 1974, respectively.

Some New York State cable television operators have argued that the Commission's orders charging such operators one percent of their "gross annual receipts" are not enforceable in light of Section 76.31(b) of the FCC rules. One such cable operator has sought a judicial declaration that Section 76.31(b) and the Supremacy Clause of the Federal Constitution render Section 817 unenforceable.* The

* This challenge to the statute and to the Commission's implementing orders was recently rejected, without discussion of the 76.31(b) argument. See Ceracche Television Corporation v. Kelly, et al., _____ NYS 2d _____ (Supreme Court, Albany County), November 8, 1974 (copy annexed hereto as Appendix B).

industry's reliance on Section 76.31(b) is based on a discrepancy between the relatively broad definition of the term "gross annual receipts" and the relatively narrow definition of the term "gross subscriber revenues."*

For reasons to be discussed below, we believe any contention that Section 76.31(b) is inconsistent with Section 817 of the New York State statute to be incorrect.

In defending Section 817 in the Ceracche case, supra, we argued that the statute and the rule were not in conflict and that we had no desire to force the statutory and constitutional determinations that would be required if a conflict

* The term "gross annual receipts" as used in Section 817 is defined in Section 812(5) of the Executive Law to mean "any and all compensation received directly or indirectly by a cable television company from its operations within the state, including but not limited to sums received from subscribers or users in payment for programs received and/or transmitted, advertising and carrier service revenue and any other moneys that constitute income in accordance with the system of accounts approved by the commission." In the recent Clarification of Rules and Notice of Proposed Rulemaking, the FCC stated that "gross subscriber revenues" "includes only those revenues derived from the supplying of regular subscriber service. . . . It does not include revenues derived from per-program or per-channel charges, leased channel revenues, advertising revenues, or any other income derived from the system." Clarification, para. 95.

should be demonstrated.* The court's decision left unclear the basis for its rejection of the plaintiff's reliance on Section 76.31(b), and, in any event, we believe it inappropriate to request the New York courts to interpret Section 76.31(b) when the FCC is free at any time to announce its own interpretation. Accordingly, we urge the FCC to resolve this matter itself and to make clear in the declaratory ruling sought herein that Section 817 is fully consistent with the letter and spirit of Section 76.31(b). We believe such a ruling is justified--indeed, compelled--by the following considerations.

As discussed above, the New York statute permits nothing more than the recoupment of petitioner's legitimate regulatory expenses. The statute is therefore fully consistent with Section 76.31(b), since the FCC has made clear that the franchise fees authorized by that section are intended to compensate the state or local governmental unit for its regulatory expenses. Thus, in the February 1972 Cable Television Report and Order which led to the adoption of Section 76.31(b), the Commission noted (para. 185) that

* In filing this petition, we reserve our right to challenge the statutory and constitutional authority for Section 76.31(b).

"many local authorities appear to have extracted high franchise fees more for revenue-raising than for regulatory purposes." The Commission stated that its rule was designed "to strike a balance that permits the achievement of federal goals and at the same time allows adequate revenues to defray the costs of local regulation" (*ibid.*, emphasis added). In the Clarification of Rules and Notice of Proposed Rulemaking issued April 17, 1974, the Commission again made clear that Section 76.31(b) is designed to prohibit the use of franchise fees as a revenue-raising device but is not intended to prohibit the reimbursement of legitimate regulatory expenses. The Commission stated (para. 93) that its rule should "more than adequately compensate the average franchising authority for actual regulatory costs."

It should be emphasized that although the New York statute does not describe a cable company's fee obligation as a percentage of that company's "gross subscriber revenues", this fact does not make the statute inconsistent with Section 76.31(b). Indeed, the Clarification makes clear (para. 98) that "[r]egardless of how the fee is stated. . . we will attempt to translate the fee into a percentage of

gross subscriber revenues to see if it reasonably complies with our rules." No one has suggested that the fees assessed by the New York Commission or the total expenses of the Commission constitute even three percent, let alone five percent, of the "gross subscriber revenues" of the New York State cable television industry. Moreover, it should again be emphasized that in the normal course of events, the fees authorized by Section 817 are measured not by reference to the "gross annual receipts" of the cable industry, but rather by reference to the Commission's costs and expenses. "Gross annual receipts" are used for the purpose of allocating responsibility for the Commission's costs and expenses, but the costs and expenses are the sole determinant of the amount to be recovered from the industry. Only when the costs and expenses cannot be recovered in full because of the one percent limitation in Section 817 do the "gross annual receipts" become relevant in determining the amount to be recovered.

Quite apart from the general considerations outlined above, we point out that the Commission has recently held that a Minnesota statute virtually identical to Section 817 "is essentially self-justifying on its face" since it is directly related to the "operational costs of the commission."

Metro Cable, Inc., FCC 74-1294, Memorandum Opinion and Order released December 9, 1974, para. 3. There is no basis for a different conclusion in this case. It is true that the term "gross annual receipts", which appears in both statutes, is more narrowly defined in the Minnesota statute and that, as a result, the upper limit on state fees is higher in New York than in Minnesota. However, the significant point is that in neither state may the fees exceed the costs and expenses of the agency in question. Thus, the reasoning in Metro Cable is fully applicable to the New York statute.

It should also be noted that the decision in Metro Cable authorized the collection of the state's one percent fee and a three percent fee levied by each of the franchising municipalities involved in that case. Thus, as the Commission noted (para. 2), ". . . the combined total fees imposed upon the subject cable systems amount to four percent of gross subscriber revenues." Here, by contrast, the Commission need only decide that the assessment authorized by Section 817 of the Executive Law is, by itself, consistent with Section 76.31(b). For while it is true that New York municipalities may impose franchise fees, Section 818 of the Executive Law makes clear that those fees, when added to the state fee,

may not exceed any applicable federal limitation and that
the state fee has priority.*

For the foregoing reasons, the Commission should
grant the declaratory relief requested herein and remove any
doubt that Section 817 of the New York State Executive Law
is fully consistent with Section 76.31(b).

Respectfully submitted,

NEW YORK STATE COMMISSION
ON CABLE TELEVISION

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January 22, 1975

* Section 818 provides as follows: "Nothing in this article shall be construed to limit the power of any municipality to impose upon any cable television company, a fee, tax or charge, provided that any such fee, tax or charge when added to the amount payable to the commission pursuant to section eight hundred seventeen does not exceed the maximum amount permitted by applicable federal law, rules or regulations."

may not exceed any of the... federal... and the
the state... for the...
For the... Commission...

ARTICLE 28—COMMISSION ON CABLE TELEVISION [NEW]

- Sec.
- §11. Declaration of legislative findings and intent.
 - §12. Definitions.
 - §13. Application of article.
 - §14. Commission created.
 - §15. Duties of the commission.
 - §16. Powers of the commission.
 - §17. Costs and expenses of the commission.
 - §18. Municipal fees; taxes or charges.
 - §19. Franchise requirement.
 - §20. Construction of systems.
 - §21. Certificate of confirmation.
 - §22. Transfer, renewal or amendment of franchises and transfer of control over franchises and system properties.
 - §23. Interconnection and system coordination.
 - §24. Requirement for adequate service.
 - §25. Rates.
 - §26. Abandonment of service.
 - §27. Termination of franchises.
 - §27-a. Forfeiture.
 - §28. Landlord-tenant relationship.
 - §29. Censorship prohibited.
 - §30. Liability for obscenity, defamation and invasion of privacy.
 - §31. Invalid provisions.

§ 811. Declaration of legislative findings and intent.

Upon investigation of the public interest associated with cable television, the legislature of the state of New York has determined that while cable television serves in part as an extension of interstate broadcasting, operations involve public rights-of-way, municipal franchising, and vital business and community service, and, therefore, are of state concern; that while said operations must be subject to state oversight, they also must be protected from undue restraint and regulation so as to assure cable systems with optimum technology and maximum penetration in this state as rapidly as economically and technically feasible; that municipalities and the state would benefit from valuable educational and public services through cable television systems; that the public and the business community would benefit if served by cable channels sufficient to meet the needs of producers and distributors of program and other communication content services; and that the cable television industry is in a period of rapid growth and corporate consolidation and should proceed in accord with regional and state-wide service objectives; and, many municipalities lack the necessary resources and expertise to plan for and secure these benefits and to protect subscribers and other parties to the public interest in franchise negotiations.

There is, therefore, a need for a state agency to develop a state telecommunications policy; to promote the rapid development of the cable television industry responsive to community and public interest and consonant with policies, regulations and statutes of the federal government; to assure that cable television companies provide adequate, economical and efficient service to their subscribers, the municipalities

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within which they are franchised and other parties to the public interest; and, to encourage the endeavors of public and private institutions, municipalities, associations and organizations in developing programming for the public interest.

It is the intent of the legislature in the enactment of this article to vest authority in an independent commission to oversee development of the cable television industry in New York State in accordance with a statewide service plan;—to review the suitability of practices for franchising cable television companies to protect the public interest; to set standards for cable television systems and franchise practices; to assure channel availability for municipal services, educational television, program diversity, local expression and other program and communications content services; to provide consultant services to community organization and municipalities in franchise negotiations; and, to stimulate the development of diverse instructional, educational, community interest and public affairs programming with full access thereto by cable television companies, educational broadcasters and public and private institutions operating closed circuit television systems and instructional television fixed services.

Added L.1972, c. 466, § 1.

¹ Another section 811 is set out in article 27, ante.

Effective Date. Section 4 of L. that this section is effective Jan. 1, 1972, c. 466; renumbered 5 and 1973.
amended L.1972, c. 467, § 8, provided

§ 812.¹ Definitions

The words and phrases used in this article shall have the following meanings unless a different meaning clearly appears in the context.

(1) "Cable television company" shall mean any person owning, controlling, operating, managing or leasing a cable television system within the state.

(2) "Cable television system" shall mean any system which operates for hire the service of receiving and amplifying programs broadcast by one or more television and/or radio stations and any other programs originated by a cable television company or by another party, and distributing such programs by wire, cable microwave or other means, whether such means are owned or leased, to persons who subscribe to such service. Such definition does not include:

- (a) any system which serves fewer than fifty subscribers; or
- (b) any master antenna television system.

(3) "Commission" shall mean the commission on cable television created by this article.

(4) "Franchise" shall mean and include any authorization granted by a municipality in terms of a franchise, privilege, permit, license or other municipal authorization to construct, operate, maintain, or manage a cable television system in any municipality.

(5) "Gross annual receipts" shall mean any and all compensation received directly or indirectly by a cable television company from its operations within the state, including but not limited to sums received from subscribers or users in payment for programs received and/or transmitted, advertising and carrier service revenue and any other moneys that constitute income in accordance with the system of accounts approved by the commission.

Gross annual receipts shall not include any taxes on services furnished by a cable television company imposed directly on any subscriber or user by any municipality, state, or other governmental unit and collected by the company for such governmental unit.

(6) "Master antenna television system" shall mean any system which serves only the residents of one or more apartment dwellings under common ownership, control or management and any commercial establishment located on the premises of such apartment house and which

transmits only signals broadcast over the air by stations which may be normally viewed or heard locally without objectionable interference, and which does not provide any additional service over its facilities.

(7) "Municipality" shall mean any village, town, city or county not wholly contained within a city in the state.

(8) "State" shall mean the state of New York.

(9) "State agency" shall mean any office, department, board, commission, bureau, division, public corporation, agency or instrumentality of the state.

(10) "Person" shall mean any individual, trustee, partnership, association, corporation or other legal entity.

(11) "Program" shall mean any broadcast-type program, signal, message, graphics, data, or communication content service.

Added L.1972, c. 466, § 1.

1 Another section 812 is set out in article 27, ante.

Effective Date. Section 4 of L. that this section is effective Jan. 1, 1972, c. 466; renumbered 5 and 1973.

amended L.1972, c. 467, § 8, provided

§ 813.¹ Application of article

The provisions of this article shall apply to every cable television system and every cable television company as defined in section eight hundred twelve of this article, operating within the state of New York, including a cable television company which constructs, operates and maintains a cable television system in whole or in part through the facilities of a person franchised to offer common or contract carrier services. Persons possessing franchises for any of the purposes contemplated by this article, shall be deemed to be subject to the provisions of this article although no property may have been acquired, business transacted or franchises exercised.

Added L.1972, c. 466, § 1.

1 Another section 813 is set out in article 27, ante.

Effective Date. Section 4 of L. that this section is effective Jan. 1, 1972, c. 466; renumbered 5 and 1973.

amended L.1972, c. 467, § 8, provided

§ 814.¹ Commission created

1. A state commission on cable television is hereby created within the executive department which shall consist of five members none of whom shall hold any other public office and no more than three of whom shall be of the same political party. The members of the commission shall be representative of the broad range of interests related to telecommunication needs and concerns including so far as possible the fields of broadcasting, education television, cable television, communication technology and consumer interests.

2. Each member shall be appointed by the governor, by and with the advice and consent of the senate, for five years, provided, however, that of the five members first appointed, one shall be appointed for one year, one for two years, one for three years, one for four years and one for five years, from January first next succeeding their appointment. Their successors shall be appointed for terms of five years each. Members shall continue in office until their successors have been appointed and qualified.

3. The governor shall designate one of the members to be chairman who shall be the chief executive officer of the commission. The members shall elect one of their number as vice chairman of the commission.

4. Vacancies in the commission occurring otherwise than by expiration of term shall be filled for the unexpired term in the same manner as original appointments.

5. The chairman and the other members of the commission shall receive compensation fixed by the governor within the amounts made

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available by appropriation therefor. The commission, its members, officers and employees shall be subject to the provisions of sections seventy-three and seventy-four of the public officers law.

6. A majority of the members of the commission then in office shall constitute a quorum for the transaction of any business or the exercise of any power or function of the commission. The commission may delegate to one or more of its members, or its officers, agents or employees, such powers and duties as it may deem appropriate.

7. The commission may appoint a counsel, an executive director and such other officers, employees, agents and consultants as it may deem necessary, prescribe their duties and fix their compensation within the amounts available therefor by appropriation.

Added L.1972, c. 466, § 1.

1 Another section 814 is set out in article 27, ante.

Effective Date. Section 4 of L. 1972, c. 466; renumbered 5 and amended L.1972, c. 467, § 8, provided that this section is effective Jan. 1, 1973.

§ 815.¹ Duties of the commission

The commission shall:

(1) develop and maintain a statewide plan for development of cable television services, setting forth the objectives which the commission deems to be of regional and state concern;

(2) to the extent permitted by, and not contrary to applicable federal law, rules and regulations:

(a) prescribe standards for procedures and practices which municipalities shall follow in granting franchises, which standards shall provide for (i) the issuance of a public invitation to compete for the franchise; (ii) the filing of all franchise applications and related documents as public records, with reasonable notice to the public that such records are open to inspection and examination during reasonable business hours; (iii) the holding of a public hearing, upon reasonable notice to the public and the commission, at which the applicants and their proposals shall be examined and members of the public and interested parties are afforded a reasonable opportunity to express their views thereon; (iv) the rendition of a written report by the municipality, made available to the public, setting forth the reasons for its decision in awarding the franchise; and (v) such other procedural standards as the commission may deem necessary or appropriate to assure maximum public participation and competition and to protect the public interest;

(b) prescribe minimum standards for inclusion in franchises, including maximum initial and renewal terms; minimum channel capacity; provisions regarding access to, and facilities to make use of, channels for education and public service programs; a requirement that no such franchise may be exclusive; standards necessary or appropriate to protect the interests of viewers of free broadcast television and the public generally, which prohibit or limit cable television companies from prohibiting or entering into agreements prohibiting the sale or other transfer of rights for the simultaneous or subsequent transmission over free broadcast television of any program originated or transmitted over cable television; and such other standards for inclusion in franchises as the commission shall deem necessary or appropriate to protect the public interest;

(c) prescribe standards by which the franchising authority shall determine whether an applicant possesses (i) the technical ability, (ii) the financial ability, (iii) the good character and (iv) other qualifications necessary to operate a cable television system in the public interest;

(d) prescribe standards for the construction and operation of cable television systems, which standards shall be designed to promote (i) safe, adequate and reliable service to subscribers, (ii) the construction and operation of systems consistent with the most advanced state of the art, (iii) a construction schedule providing for maximum penetration as rapidly as possible within the limitations of economic feasibility, (iv) the construction of systems with the maximum practicable channel capacity, facilities for local program origination, facilities to provide service in areas conforming to various community interests, facilities with the technical capacity for interconnection with other systems within regions as established in the commission's statewide plan and facilities capable of transmitting signals from subscribers to the cable television company or to other points; and (v) the prompt handling of inquiries, complaints and requests for repairs;

(e) prescribe such standards for the prohibition or limitation of concentration of control over mass media and communication companies and facilities and methods of enforcing such standards, as the commission may determine to be necessary or appropriate to protect the public interest; provided, however, that nothing herein contained shall be construed to authorize the impairment of any existing rights of any mass media and communication company or any subsidiary thereof.

(3) provide advice and technical assistance to municipalities and community organizations in matters relating to cable television franchises and services;

(4) establish minimum specifications for equipment, service and safety of cable television systems for use by municipalities;

(5) review and act upon applications for certificates of confirmation in accordance with such standards and as hereinafter provided;

(6) represent the interests of the people of the state before the federal communication commission and make available information on communications developments at the federal level;

(7) stimulate and encourage cooperative arrangements among organizations, institutions and municipalities in the development of regional educational, instructional and public affairs programming services;

(8) cooperate with municipalities to facilitate undertaking of multiple community cable television systems;

(9) encourage the creation of public and community groups, to organize, seek chartering when appropriate, and request franchising for the establishment of public, non-profit and not-for-profit cable television operations;

(10) maintain liaison with the communications industry and parties both public and private, having an interest therein, other states and agencies of this state to promote the rapid and harmonious development of cable television services as set forth in the legislative findings and intent;

(11) undertake such studies as may be necessary to meet the responsibilities and objectives of this article.

Added L.1972, c. 466, § 1; amended L.1972, c. 467, §§ 1, 2.

¹ Other sections 815 are set out in articles 27 and 27-A, ante.

1972 Amendment. Subl. 2, par. (a). L.1972, c. 467, § 1, eff. Jan. 1, 1973, substituted "competition" for "completion" in clause VI.

Subl. 2, par. (b). L.1972, c. 467, § 1, eff. Jan. 1, 1973, inserted provision relating to standards to protect interests of viewers of free television.

Subl. 2, par. (c). L.1972, c. 467, § 2, eff. Jan. 1, 1973, added proviso respecting impairment of rights.

Effective Date. Section 4 of L.1972, c. 466; renumbered 3 and amended L.1972, c. 467, § 8, provided that this section is effective Jan. 1, 1973.

§ 816.¹ Powers of the commission

1. The commission may promulgate, issue, amend and rescind such orders, rules and regulations as it may find necessary or appropriate to carry out the purposes of this article. Such orders, rules and regu-

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lations may classify persons and matters within the jurisdiction of the commission and prescribe different requirements for different classes of persons or matters. A copy of any order, rule or regulation promulgated hereunder shall be subject to public inspection during reasonable business hours.

2. The commission may require cable television companies to maintain and file such reports, contracts and statements, including but not limited to ownership, accounting, auditing and operating statements, engineering reports and other data as the commission may deem necessary or appropriate to administer the provisions of this article. The commission, including members of its staff, may make reasonable inspections of the records and facilities of any cable television company.

3. The commission may examine, under oath, all officers, agents, employees and stockholders of any cable television company, municipal officials and any other persons and compel the production of papers and the attendance of witnesses to obtain the information necessary to administer the provisions of this article.

4. The commission may require and receive from any agency of the state or any political subdivision thereof such assistance and data as may be necessary to enable the commission to administer the provisions of this article. The commission may enter into such cooperative arrangements with the public service commission, the board of regents, the council on the arts, other state agencies and municipalities, each of which is hereby authorized to enter into such cooperative arrangements, as shall be necessary or appropriate to assure that there will be maximum utilization of existing expertise in communications technology, cable television operations and programming and that the purposes of this article will be effectively accomplished. Upon request of the commission, any state agency may transfer to the commission such officers and employees as the commission may deem necessary from time to time to assist the commission in carrying out its functions and duties. Officers and employees so transferred shall not lose their civil service status or rights.

5. The commission shall have and may exercise all other powers necessary or appropriate to carry out the purposes of this article.

Added L.1972, c. 466, § 1.

¹ Another section 816 is set out in article 27, ante.

Effective Date. Section 4 of L.1972, L.1972, c. 467, § 8, provided that this c. 466; renumbered 5 and amended section is effective Jan. 1, 1973.

§ 817.¹ Costs and expenses of the commission

1. All costs and expenses of the commission shall be paid pursuant to appropriation in the first instance from the state treasury, on the certification of the chairman of the commission and upon the audit and warrant of the comptroller. The state treasury shall be reimbursed therefor by payments to be made thereto from moneys collected pursuant to this article.

2. On or before May first of each year, the commission shall estimate the total costs and expenses necessary to operate and administer the commission for the current state fiscal year, including the repayment of any first instance appropriations outstanding on March thirty-first immediately preceding such fiscal year. The commission shall, at such time or times and pursuant to such procedure as it shall determine by regulation, bill and collect from each cable television company the greater of (i) one hundred dollars or (ii) an amount computed by multiplying such total estimated operating expenses of the commission by a fraction the numerator of which is the gross annual receipts of such cable television company during such twelve month period preceding the date of computation as the commission shall designate by regulation, and the denominator of which is the total gross annual receipts of all cable television companies operating in the state during such period. A cable television company may elect to make partial pay-

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ments equal to one quarter of the total amount billed June thirtieth, September thirtieth, December thirty-first and March tenth of the fiscal year to which the billing relates. On or before September fifteenth of each year, the commission shall compute the actual costs and expenses of the commission for the preceding state fiscal year and shall, on or before October fifteenth of such year, send to each cable television company a statement setting forth the amount due and payable by, or the amount standing to the credit of, such cable television company computed on the basis of the above stated formula, except that for the purposes of such computation the fraction shall be multiplied against the total actual operating expenses of the commission for such fiscal year. Any amount owing by any cable television company shall be payable not later than thirty days following the date of such statement. Any amount standing to the credit of any cable television company shall be applied as a credit against any succeeding payment due. In no event shall the amount billed to or collected from any cable television company pursuant to this section exceed one percent of the gross annual receipts of such company during the twelve month period designated by the commission. Added L.1972, c. 466, § 1; amended L.1972, c. 467, § 3; L.1974, c. 528, § 1.

1 Another section 817 is set out in article 27, ante.

1974 Amendment. Subd. 2. L.1974, c. 528, § 1, eff. Nov. 30, 1974, substituted "On or before May first" for "On or before December first", "the current state fiscal year" for "the next ensuing state fiscal year", and "elect to make partial payments equal to one quarter of the total amount billed on June thirtieth, September thirtieth, December thirty-first and March tenth of the fiscal year to which the billing relates" for "elect to make partial payments for such costs and expenses on March thirty-first, June thirtieth, September thirtieth and, December thirty-first of each year."

1972 Amendment. Subd. 2. L.1972, c. 467, § 3, eff. Jan. 1, 1973, omitted estimate of compensation for personal services, provided for estimate to include repayment of any first instance appropriations, and inserted provisions relating to computation of expenses on or before September 15 of each year and procedure pertaining thereto, payment of amounts due and crediting of payments not applied to future payments due.

Effective Date. Section 4 of L. 1972, c. 466; renumbered 5 and amended L.1972, c. 467, § 3, provided.

§ 818.1 Municipal fees; taxes or charges

Nothing in this article shall be construed to limit the power of any municipality to impose upon any cable television company, a fee, tax or charge, provided that any such fee, tax or charge when added to the amount payable to the commission pursuant to section eight hundred seventeen does not exceed the maximum amount permitted by applicable federal law, rules or regulations.

Added L.1972, c. 466, § 1.

1 Another section 818 is set out in article 27, ante.

Effective Date. Section 4 of L. 1972, c. 466; renumbered 5 and amended L.1972, c. 467, § 3, provided that this section is effective Jan. 1, 1973.

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§ 819.1 Franchise requirement

1. Notwithstanding any other law, no cable television system, whether or not it is deemed to occupy or use a public thoroughfare, may commence operations or expand the area it serves after April first, nineteen hundred seventy-three unless it has been franchised by each municipality in which it proposes to provide or extend service.

2. A municipality shall have the power to require a franchise of any cable television system providing service within the municipality, notwithstanding that said cable television system does not occupy, use or in any way traverse a public street. The provision of any municipal charter or other law authorizing a municipality to require and grant franchises is hereby enlarged and expanded, to the extent necessary, to authorize such franchises.

3. Nothing in this article shall be construed to prevent franchise requirements in excess of those prescribed by the commission, unless such requirement is inconsistent with this article or any regulation, policy or procedure of the commission.

Added L.1972, c. 466, § 1.

¹ Another section 819 is set out in article 27, ante.

Effective Date. Section 4 of L. that this section is effective Jan. 1, 1972, c. 466; renumbered 5 and 1973.
amended L.1972, c. 467, § 8, provided

§ 820. Construction of systems

Every cable television system constructed after April first, nineteen hundred seventy-three, shall comply with such construction standards as the commission may prescribe pursuant to subdivision two of section eight hundred fifteen.

Added L.1972, c. 466, § 1.

Effective Date. Section 4 of L. that this section is effective Jan. 1, 1972, c. 466; renumbered 5 and 1973.
amended L.1972, c. 467, § 8, provided

§ 821. Certificate of confirmation

1. Except as provided in subdivision six of this section, after April first, nineteen hundred seventy-three, no person shall exercise a franchise, and no such franchise shall be effective, until the commission has confirmed such franchise. A person wishing to exercise a franchise shall file with the commission an application for a certificate of confirmation in such form and containing such information and supportive documentation as the commission may require. The application shall be accompanied by proof of service thereof upon the franchisor and by such fee as the commission may set.

2. The commission may hold a public hearing on any application for a certificate of confirmation if it determines that such a hearing is in the public interest. The commission shall fix the time and place for such a hearing and cause notice thereof to be given to the applicant, the chief executive officer of the municipality issuing the franchise and such other persons as the commission may deem appropriate. Testimony may be taken and evidence received at such a hearing pursuant to such rules and procedures as the commission may establish.

3. The commission shall issue a certificate of confirmation of the franchise unless it finds that (a) the applicant, (b) the proposed cable television system, or (c) the proposed franchise does not conform to the standards embodied in the regulations promulgated by the commission pursuant to subdivision two of section eight hundred fifteen, or that operation of the proposed cable television system by the applicant under the proposed franchise would be in violation of law, any regulation or standard promulgated by the commission or the public interest.

4. The commission may issue a certificate of confirmation contingent upon compliance with standards, terms or conditions set by the com-

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mission which it determines would not have been met by the applicant, system or franchise as proposed.

5. In the event the commission refuses to issue a certificate of confirmation, it shall set forth in writing the reasons for its decision.

6. Any cable television company which, pursuant to an existing franchise, (i) was lawfully engaged in actual operations, or (ii) had commenced substantial construction (as such term is defined by the commission) of a cable television system on January first, nineteen hundred seventy-two may continue to exercise said franchise pursuant to the terms thereof, provided such company files with the commission, on or before July first, nineteen hundred seventy-three an application in such form and containing such information and supporting documentation as the commission may require. The commission shall issue a certificate of confirmation to such a cable television company valid for five years without further proceedings, which certificate may be renewed by the commission on application for five year terms pursuant to the provisions of section eight hundred twenty-two.

7. Notwithstanding any other provision of this article, any franchise which has been granted but not exercised as indicated by substantial performance within one year of January first, nineteen hundred seventy-three shall be deemed contrary to the public interest and intent of such franchise and any certificate of confirmation previously issued by the commission shall be invalidated, unless the cable television company can make an adequate showing that substantial performance was precluded by circumstances beyond the reasonable control of such company. Any subsequent application for a certificate of confirmation shall be determined in accordance with the provisions of this section.

8. The commission shall issue a certificate of confirmation, valid for a five year period, to any cable television company engaged in actual and lawful nonfranchised cable television operations on April first, nineteen hundred seventy-three, if application for such a certificate is made to the commission on or before September first, nineteen hundred seventy-four. Notwithstanding any other provisions of this article, any such company which files such an application may continue to operate within the limits of the area in which it was actually rendering service on April first, nineteen hundred seventy-three, as determined by the commission. Such a certificate of confirmation may be renewed by the commission on application for five year terms pursuant to the provisions of section eight hundred twenty-two. Any such company which fails to file an application pursuant to this section on or before September first, nineteen hundred seventy-four, shall thereafter be prohibited from continuing operation of a nonfranchised cable television system; provided, however, that the commission may authorize such continued nonfranchised operation in extraordinary circumstances for such periods as the commission may deem appropriate.

9. Nothing in this section shall be deemed to validate a franchise not granted in accordance with law or affect any claims in litigation on the effective date of this article. No confirmation under this section shall preclude invalidation of any franchise illegally obtained.

Added L.1972, c. 466, § 1; amended L.1974, c. 88, § 1.

1974 Amendment. Subd. 8. L.1974, c. 88, § 1, eff. Mar. 19, 1974, substituted references to April 1, 1973 for January 1, 1972; Sept. 1, 1974 for July 1, 1973; 1973 for 1972, preceding "as determined by the commission"; and prohibited any company which fails to file an application on

or before Sept. 1, 1974, to continue operation of a nonfranchised cable television system.

Effective Date. Section 4 of L. 1972, c. 466; renumbered 5 and amended L.1972, c. 467, § 8, provided that this section is effective Jan. 1, 1973.

§ 822. Transfer, renewal or amendment of franchises and transfer of control over franchises and system properties

1. No transfer, renewal or amendment of any franchise, or any transfer of control of a franchise or certificate of confirmation or of

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facilities constituting a significant part of any cable television system shall be effective without the prior approval of the commission. Such approval shall be required in addition to any municipal approval required under the franchise or by law. For the purposes of this section, a merger or consolidation of two or more cable television companies shall be deemed to be a transfer of the franchises or certificates granted to such companies.

2. A person wishing to transfer, renew or amend a franchise, or to transfer control of a franchise or of a substantial part of the facilities thereof shall file with the commission an application for approval of such change, in such form and containing such information and supporting documents as the commission may require. The application shall be accompanied by proof of service thereof upon the franchisor, if any, and by such fee as the commission may set. The commission may hold a public hearing on any such application as set forth in subdivision two of section eight hundred twenty-one.

3. The commission shall approve the application unless it finds that the applicant, the proposed transferee or the cable television system does not conform to the standards embodied in the regulations promulgated by the commission pursuant to section eight hundred fifteen or that approval would be in violation of law, any regulation or standard promulgated by the commission or the public interest: provided, however, that a failure to conform to the standards embodied in the regulations promulgated by the commission shall not preclude approval of any such application if the commission finds that such approval would serve the public interest.

4. The commission may approve the application contingent upon compliance with standards, terms or conditions set by the commission which it determines would not have been met by the proposed transfer, renewal or amendment.

5. In the event the commission refuses to approve the application, it shall set forth in writing the reasons for its decision.

6. Approval of a transfer, renewal or amendment under this section shall not preclude invalidation of a franchise illegally obtained.
Added L.1972, c. 466, § 1; amended L.1974, c. 87, § 1.

1974 Amendment. Subd. 2. L.1974, c. 87, § 1, eff. Mar. 19, 1974, corrected text by substituting "franchisor" for "franchise or."

Subd. 3. L.1974, c. 87, § 1, eff. Mar. 19, 1974, added proviso that a failure to conform to the standards in the regulations shall not preclude

approval if the commission finds such approval serves the public interest.

Effective Date. Section 4 of L. 1972, c. 466; renumbered 5 and amended L.1972, c. 467, § 8, provided that this section is effective Jan. 1, 1973.

§ 823. Interconnection and system coordination

Whenever the commission finds it to be in the public interest, the commission may, either upon application of an interested party or on its own initiative, and after public notice and opportunity for hearing, order the interconnection of cable television systems and facilities or the coordinated operation of such systems and facilities. The commission may append to such order such reasonable terms and conditions as will best promote the public interest.

Added L.1972, c. 466, § 1.

Effective Date. Section 4 of L. 1972, c. 466; renumbered 5 and amended L.1972, c. 467, § 8, provided that this section is effective Jan. 1, 1973.

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§ 824. Requirement for adequate service

1. Every cable television company shall provide safe, adequate and reliable service in accordance with applicable laws, regulations, and franchise requirements.

2. Whenever, upon complaint or upon its own motion, and after public notice and opportunity for hearing, the commission finds that, despite its economic feasibility, the construction or operation of a franchised or certificated cable television system has been unreasonably delayed or that the extension of service to any persons or area within a cable television company's territory has been unreasonably withheld, it may order such construction, operation or extension on such terms and conditions as it deems reasonable and in the public interest.

3. Whenever, upon complaint or upon its own motion, and after public notice and opportunity for hearing, the commission finds that a cable television company is not meeting the service requirements and obligations imposed by this article, by the regulations promulgated hereunder, or by its franchise, it may order compliance therewith on such terms and conditions as it deems reasonable and in the public interest.

4. Failure to comply with an order of the commission issued under subdivisions two or three shall be grounds for denial, suspension or revocation of the right to exercise a franchise or to operate pursuant to a certificate of confirmation.

Added L.1972, c. 466, § 1.

Effective Date. Section 4 of L. that this section is effective Jan. 1, 1972, c. 466; renumbered 5 and 1973.
amended L.1972, c. 467, § 8, provided

§ 825. Rates

1. Except as otherwise provided in this section, the rates charged by a cable television company shall be those specified in the franchise which may establish, or provide for the establishment of reasonable classifications of service and categories of subscribers, or charge different rates for differing services or for subscribers in different categories.

2. Such rates may not be changed except by amendment of the franchise.

3. Notwithstanding subdivision one, (a) no rate provision in any franchise shall bind a municipality for more than ten years and no rate provision in any renewed franchise shall bind a municipality for more than five years. In the event that an existing franchise purports to bind a municipality with respect to rates for a period to expire after January first, nineteen hundred eighty-three, such provisions shall have no further force or effect after January first, nineteen hundred eighty-three; and (b) any rate or rates found by the commission, after public notice and opportunity for hearing, to be discriminatory or preferential as between subscribers similarly situated shall thereafter be void. Reduced rates or free service to government, educational or charitable institutions shall not be considered unduly discriminatory or preferential.

4. In the event the commission finds that any rate is discriminatory or preferential pursuant to paragraph (b) of subdivision three of this section or that any cable television company is in violation of an order issued by the commission pursuant to section eight hundred twenty-four of this article requiring adequate service, it may issue an order requiring the municipality and the cable television company to provide for new rates which are non-discriminatory and non-preferential or reduced to reflect the inadequate service, as the case may be.

5. In addition to other powers, the commission may, after public notice and opportunity for hearing, prescribe rates for cable television service whenever:

(a) existing rates have been found discriminatory or preferential and, after reasonable opportunity, the municipality and the cable

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television company have not provided for new rates which are non-discriminatory or non-preferential, as provided in subdivision four of this section;

(b) a cable television company is in violation of an order issued by the commission pursuant to section eight hundred twenty-four of this article requiring adequate service and, after reasonable opportunity, the municipality and the cable television company have not provided for new rates reduced to reflect the inadequate service, in which case the commission may require appropriate rate reductions;

(c) having reduced rates pursuant to paragraph b, the commission finds that the cable television company has substantially remedied the deficiencies, in which case the commission shall return the rates to those rates stipulated in the franchise;

(d) upon complaint by any interested party and after reasonable opportunity for negotiation between the municipality and the franchisee, it finds that rates are not established by or pursuant to the terms of the franchise, in which event, the commission shall fix rates at a level comparable to rates fixed in comparable franchises requiring comparable service for comparable service areas; and

(e) upon request by a municipality and cable television company that the commission prescribe applicable rates, made in such manner as the commission by regulation may prescribe and certifying that they are in agreement upon rates to include in any franchise or renewal franchise, in which event the commission shall fix rates at a level comparable to rates currently being fixed in cable television franchises for comparable service in comparable service areas; provided that if the municipality and the company thereafter agree upon rates, such agreed rates shall become effective.

Added L.1972, c. 466, § 1; amended L.1972, c. 467, §§ 4, 5.

1972 Amendment. Subd. 4, L.1972, c. 467, § 4, eff. Jan. 1, 1973, inserted "and the cable television company."

Subd. 5, L.1972, c. 467, § 5, eff. Jan. 1, 1973, substituted "and the cable television company have" for "has" in para. (a) and (b).

Effective Date. Section 4 of L. 1972, c. 466; renumbered 5 and amended L.1972, c. 467, § 8, provided that this section is effective Jan. 1, 1973.

§ 826. Abandonment of service

1. No cable television company, notwithstanding any provision in a franchise, may abandon any service or portion thereof without having given six months' prior written notice to the commission and to the franchisor, if any, and to the municipalities it serves.

2. When abandonment of any service is prohibited by a franchise, no cable television company may abandon such service without written consent of the franchisor, if any, and the commission. In granting such consent, the commission may impose such terms, conditions or requirements as in its judgment are necessary to protect the public interest.

Added L.1972, c. 466, § 1; amended L.1972, c. 467, § 6.

1972 Amendment. Subd. 1, L.1972, c. 467, § 6, eff. Jan. 1, 1973, inserted "company."

Effective Date. Section 4 of L.1972, c. 466; renumbered 5 and amended L.1972, c. 467, § 8, provided that this section is effective Jan. 1, 1973.

§ 827. Termination of franchises

1. A franchise shall terminate at the expiration of its term or otherwise in accordance with the provisions thereof, unless, prior thereto, the commission otherwise orders. The commission may so order only if it finds, after public notice and opportunity for a hearing, that the franchisee:

a. has committed a material breach of its franchise or any applicable provisions of this article or of the regulations promulgated hereunder

and has failed, without reasonable justification, to cure said breach within sixty days after having received written notice thereof from the commission, or

b. has been adjudicated a bankrupt or has filed a voluntary petition for bankruptcy or reorganization or for an order protecting its assets from the claims of creditors and the commission finds that termination of the franchise or certificate of confirmation under such conditions is in the best interests of the public.

2. Upon termination of a franchise or certificate of confirmation, the cable television company shall dispose of its facilities in accordance with the provisions of the franchise or certificate. However, on motion of any interested party or upon its own motion, and after public notice and opportunity for hearing, if the commission finds that the continued presence of the facilities in any public thoroughfare would pose a nuisance to the municipality or its residents, the cable television company shall remove its facilities within such period as the commission shall order. In the absence of any applicable franchise or certificate provision or order by the commission to the contrary, the cable television company may abandon its facilities.

Added L.1972, c. 466, § 1.

Effective Date. Section 4 of L.1972. L.1972, c. 467, § 8, provided that this section is effective Jan. 1, 1973.

§ 827-a. Forfeiture

1. Every cable television company, and all officers, agents and employees of any cable television company shall obey, observe and comply with every order, direction or requirement made by the commission, under authority of this article, so long as the same shall be and remain in force. Except as provided in subdivision two of this section, any cable television company which shall violate any provision of this article, or which fails, omits or neglects to obey, observe or comply with any order or any direction or requirement of the commission, shall forfeit to the people of the state of New York a sum to be set by the commission not to exceed one thousand dollars for each and every offense; every violation of any such order or direction or requirement, or of this article, shall be a separate and distinct offense, and, in case of a continuing violation, every day's continuance thereof shall be a separate and distinct offense.

2. Notwithstanding subdivision one of this section, any cable television company which (a) shall fail to make and file its annual report as and when required or within such extended time as the commission may allow, or (b) shall fail to make specific answers to any question within the period specified by the commission for the making and filing of such answers, or (c) shall fail to submit such special reports as the commission may from time to time require, within the period specified by the commission for the submission thereof, shall forfeit to the state the sum of one hundred dollars for each and every day such company shall continue to be in default with respect to such annual report, answer, or special report.

3. An action to recover a forfeiture under subdivisions one or two of this section may be brought at any time within one year after the cause of action accrues, in any court of competent jurisdiction in this state, in the name of the people of the state of New York, on the relation of the commission. In any such action all forfeitures incurred up to the time of commencing the same may be sued for and recovered therein, and the commencement of an action to recover a forfeiture shall not be, or be held to be, a waiver of the right to recover any other penalty or forfeiture. All monies recovered in any such action, together with the costs thereof, shall be paid into the state treasury to the credit of the general fund.

Added L.1974, c. 441, § 1; amended L.1974, c. 442, § 1.

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1974 Amendment. Subd. 3. L. 1974, c. 442, § 1, eff. on the 60th day after May 23, 1974, eliminated provisions which required actions to recover forfeitures to be commenced and prosecuted by counsel to the commission.

Effective Date. L. 1974, c. 441, § 2, provided that this section shall take effect on the 60th day after May 23, 1974.

§ 828. Landlord-tenant relationship

1. No landlord shall a. interfere with the installation of cable television facilities upon his property or premises, except that a landlord may require:

i. that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants;

ii. that the cable television company or the tenant or a combination thereof bear the entire cost of the installation, operation or removal of such facilities; and

iii. that the cable television company and the tenant agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities.

b. demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable; or

c. discriminate in rental charges, or otherwise, between tenants who receive cable television service and those who do not.

2. Rental agreements and leases executed prior to the effective date of this article may be enforced notwithstanding this section.

3. No cable television company may enter into any agreement with the owners, lessees or persons controlling or managing buildings served by a cable television, or do or permit any act, that would have the effect, directly or indirectly of diminishing or interfering with existing rights of any tenant or other occupant of such building to use or avail himself of master or individual antenna equipment.

Added L. 1972, c. 466, § 1; amended L. 1972, c. 467, § 7.

1972 Amendment. Subd. 1, par. b. L. 1972, c. 467, § 7, eff. Jan. 1, 1973, inserted "from any tenant" and added "or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable."

Effective Date. Section 4 of L. 1972, c. 466; renumbered 5 and amended L. 1972, c. 467, § 8, provided that this section is effective Jan. 1, 1973.

§ 829. Censorship prohibited

1. The commission may not prohibit or limit any program or any class or type of program or otherwise censor the communications or signals transmitted by any cable television company or over any cable television system, and may not promulgate any regulation or condition which would interfere with the right of free speech by means of cable television.

2. No municipality may prohibit or limit any program or class or type of program or impose discriminatory or preferential franchise fees in any manner that would tend to encourage or discourage programming of any particular nature, directly or indirectly.

3. No cable television company may prohibit or limit any program or class or type of program presented over a leased channel or any channel made available for public access or educational purposes.

Added L. 1972, c. 466, § 1.

Effective Date. Section 4 of L. that this section is effective Jan. 1, 1972, c. 466; renumbered 5 and 1973.
amended L.1972, c. 467, § 8, provided

§ 830. Liability for obscenity, defamation and invasion of privacy

Neither the cable television company whose facilities are used to transmit a program produced by a person other than such cable television company pursuant to the provisions of this article or of federal law or of applicable regulations, nor the officers, directors or employees of any such cable television company shall be liable for damages arising from any obscene or defamatory statements or actions or invasion of privacy occurring during any program when such company does not originate or produce such program.

Added L.1972, c. 466, § 1.

Effective Date. Section 4 of L. that this section is effective Jan. 1, 1972, c. 466; renumbered 5 and 1973.
amended L.1972, c. 467, § 8, provided

§ 831. Invalid provisions

If any provision of this article or the application of such provision to any circumstance is held invalid for any reason whatsoever, the remainder of this article or the application of the provision to other circumstances shall not be affected thereby.

Added L.1972, c. 466, § 1.

Effective Date. Section 4 of L. that this section is effective Jan. 1, 1972, c. 466; renumbered 5 and 1973.
amended L.1972, c. 467, § 8, provided

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

CERACCHE TELEVISION CORPORATION,

Plaintiff,

-against-

ROBERT F. KELLY, Chairman, JERRY A.
DANZIG, MICHAEL H. PRENDERGAST, ELI
WAGER and EDWARD J. WEGMAN, Constituting
the NEW YORK STATE COMMISSION ON CABLE
TELEVISION,

Defendants.

In the Matter

of

CERACCHE TELEVISION CORPORATION,
on its own behalf and on behalf of
a class pursuant to CPLR 1005,

Petitioner,

-against-

ROBERT F. KELLY, Chairman, JERRY A.
DANZIG, MICHAEL H. PRENDERGAST, ELI
WAGER and EDWARD J. WEGMAN, Constituting
the NEW YORK STATE COMMISSION ON CABLE
TELEVISION,

Respondents,

For Judgment Under CPLR Article 78

Supreme Court, Albany County Special Term, November 8, 1974

Justice Edward S. Conway, presiding

(Calendar #13)

APPEARANCES:

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CONWAY, J:

Ceracche Television Corporation, on its own behalf and as a representative of a class, makes two motions; first, for a declaratory judgment declaring that Section 817 of the Executive Law is unconstitutional and requiring the return of all money paid to the State as required by the Section; and second, for a judgment pursuant to Article 78 of CPLR setting aside an order of the State Commission on Cable Television (General Order No. 4) which implements Section 817 of the Executive Law.

In the declaratory judgment action, plaintiff-petitioner has moved for summary judgment and the defendants-respondents have cross-moved for a summary judgment declaring the Section in question to be constitutional and valid in all respects. In the Article 78 proceeding, the respondent Commission has by its answer raised objections in point of law and asks for dismissal of the proceeding.

Plaintiff-petitioner Ceracche Television Corporation is a corporation engaged in the business of operating cable television systems in the State of New York. Defendants-respondents constitute the New York State Commission on Cable Television authorized to regulate all cable television companies in the State of New York pursuant to Article 28 of the Executive Law, Section 811-et seq., enacted as Chapter 466 of the Laws of 1972.

Essentially, Section 817 of the Executive Law establishes the reimbursement procedure by which the Cable Television Commission defrays its expenses. It provides that the expenses of the Commission shall be allocated among the various cable television companies in proportion to their gross receipts. In no event, however, shall any company be assessed for more than one percent of its gross receipts for any twelve-month period.

The plaintiff-petitioner contends that the statute imposes a gross receipts tax upon proceeds from interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution (Commerce Clause), and further that the statute in question violates the Supremacy Clause, Article VI of the Constitution as it directly violates Section 76.31 (b) of the Rules of the Federal Communications Commission.

The defendants-respondents contend that the Section reflects the well-established procedure by which many regulatory agencies recover their expenses and in no way

violates the Commerce Clause and further, that the states have the power to regulate cable television companies, as long as its regulation is reasonable and not in conflict with Federal law. The defendants-respondents also urge affirmatively that this is not a proper class action which is authorized by Section 1005 (a) CPLR.

The Court determines that this action is not properly maintained as a class action. Section 1005 (a) CPLR provides as follows:

"§ 1005. Class actions.

(a) When allowed. Where the question is one of a common or general interest of many persons or where the persons who might be made parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

The plaintiff-petitioner herein is not a proper representative of a class so as to maintain this action, as some of the services provided by plaintiff-petitioner are not provided by a majority of cable operators and plaintiff-petitioner's sources of revenue differ from the majority of cable operators. The impropriety of a class action in a case such as this was discussed by the Court of Appeals in Gaynor v. Rockefeller, 15 NY 2d 120, at page 129:

"We note, at the outset, that the four plaintiffs do not have standing to bring a representative action on behalf of all other members of the indeterminate class of Negro citizens who may have been the victims of the alleged discriminatory practices. While this class action is purportedly brought pursuant to CPLR 1005(a), that section is

merely a verbatim restatement of former section 195 of the Civil Practice Act; and, as this court explicitly announced in construing the latter section, a class action may not be maintained where the wrongs asserted are individual to the different persons involved and each of the persons aggrieved 'may determine for himself the remedy which he will seek' and may be subject to 'a defense not available against others'. (Society Million Athena v. National Bank of Greece, 281 N. Y. 282, 292; see Brenner v. Title Guar. & Trust Co., 276 N. Y. 230, 236-237.) 'Separate wrongs to separate persons, though committed by similar means and even pursuant to a single plan', we declared in the Society Million Athena case (281 N. Y., at p. 292), 'do not alone create a common or general interest in those who are wronged.'"

The Court will now turn to the constitutional question.

Gross annual receipts as used in the Executive Law, Section 817-2., is defined by Section 812 (5) as follows:

"(5) 'Gross annual receipts' shall mean any and all compensation received directly or indirectly by a cable television company from its operations within the state, including but not limited to sums received from subscribers or users in payment for programs received and/or transmitted, advertising and carrier service revenue and any other moneys that constitute income in accordance with the system of accounts approved by the commission.

Gross annual receipts shall not include any taxes on services furnished by a cable television company imposed directly on any subscriber or user by any municipality, state, or other governmental unit and collected by the company for such governmental unit."

Gross annual receipts includes only that income derived from operations within the State; the Section does not violate the Commerce Clause (Western Live Stock v. Bureau of Revenue, 303 U. S. 250; H & B Communications Corp. v. City

of Richland, 484 P. 2d 1141). In upholding a tax levied on the gross revenues of a cable television company, the court in the City of Richland case said:

"In the instant case, there is no burden on interstate commerce that is not placed on intrastate commerce. Under Richland City Ordinance No. 5.20.090, any person engaged in transmitting television by cable is subject to the gross receipts tax."

"Appellant's CATV system is not subject to the risk of repeated taxation of the same nature since it only operates in the City of Richland. Therefore, respondent's business and occupation tax violates neither the 'discrimination test' nor the 'multiple burden test' as set out in Washington-Oregon Shipper Cooperative Ass'n., Inc. v. Schumacher, supra,"

The United States Supreme Court held in Western Live Stock v. Bureau of Revenue, supra:

"Taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing state, Wisconsin & M. Ry. Co. v. Powers, 191 U. S. 379; Maine v. Grand Trunk Ry. Co., supra; Cudahy Packing Co. v. Minnesota, supra; United States Express Co. v. Minnesota, 223 U. S. 335, and in other cases has been rejected only because the apportionment was found to be inadequate or unfair."

It is also well settled that the states have the power to regulate cable television companies (TV Pix, Inc. v. Taylor, 304 F. Supp. 459; and by Federal Communications Commission Act of 1934). Congress did not intend absolute preemption of the field to the exclusion of all state regulations (Head v. New Mexico Board, 374 U. S. 424).

In National Psychological Association v. University of the State of New York, 18 Misc. 2d 722; aff'd 10 AD 2d 688; aff'd 8 NY 2d 197; appeal dismissed, 365 U. S. 298; the court said:

"Particularly, courts of first instance should not exercise transcendent power of declaring an act of the Legislature unconstitutional except in rare cases where life and liberty is involved and invalidity of the act is apparent on its face." (See Matter of Spielvogel v. Ford, 1 NY 2d 558, 562).

In the instant motion, none of the aforesaid tests are present.

The defendants-respondents General Order No. 4 constituted a reasonable and lawful implementation of Section 817-2. Executive Law. It explains the basis for the estimate of costs and expenses and the basis upon which the defendants-respondents concluded that plaintiff-petitioner and every cable television company should be assessed its one percent of its annual gross receipts.

The Article 78 proceeding challenging General Order No. 4 is therefore dismissed and the motion for a declaratory judgment is likewise dismissed, and the cross-motion declaring the Section in question constitutional is granted.

Defendants-respondents to submit order.

All papers to the Attorney General for filing upon entry of the order hereon.
Opinion mailed 12/31/74.

File Copy
NEW

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FEB 24 1970 000032

F. C. C.
OFFICE OF THE SECRETARY

In the Matter of)

Petition For Declaratory Ruling to declare)
§817 of the New York State Executive Law)
Consistent with 76.31(b) of the)
Cable Television Rules)

CSR-654

TO: The Commission

RESPONSE TO PETITION FOR
DECLARATORY RULING

The New York State Cable Television Association (the Association), by its attorneys, hereby responds to the above-referenced Petition for Declaratory Ruling filed by the New York State Commission on Cable Television (CCT). The Association is the only trade association of cable television operators in the State of New York and represents the majority of cable television systems in the state. It is therefore clearly an interested party in this matter.

CCT seeks from this Commission a declaratory ruling that a state cable fee imposed on cable television companies by Section 817 of the Executive Law of the State of New York is consistent with Section 76.31(b) of this Commission's Rules. It is pertinent to note at the outset that CCT has challenged this Commission's authority to adopt Section 76.31(b). Although its comments on this point in the instant petition are limited to a footnote

on page 5 reserving "our right to challenge the statutory and constitutional authority for Section 76.31(b)," CCT has previously made clear that it does not recognize the legality of that provision.

As stated at page 3 of CCT's Petition, one cable operator instituted a lawsuit testing the legality of Section 817. Ceracche Television Corporation v. Kelly, ____ NYS 2d ____ (Sup. Ct. Albany Co. 1974). This proceeding attacked Section 817 on two grounds: (1) that it violates the commerce clause by imposing a gross receipts tax on the proceeds of interstate commerce and (2) that it violates Section 76.31(b) of this Commission's Rules.

In its brief in the Ceracche proceeding, CCT first attempted to show its fee consistent with Section 76.31(b). It then proceeded to state that

"...it should be emphasized that if the regulation [Section 76.31(b)] were applicable to plaintiff and if it were in conflict with Section 817, the Federal Communications Commission regulation, not the New York statute, must fall."

There is attached hereto as Attachment 1 excerpts from CCT's brief in the Ceracche case concerning the legality of Section 76.31(b).

In view of its previous position, substantial question exists as to whether CCT would comply with an adverse decision with respect to its instant Petition. In view of this, the Commission should reasonably expect some prior assurance from CCT that it will comply with this Commission's decision, whether favorable or unfavorable, before proceeding to rule in this matter.

This is particularly so since CCT has previously chosen to ignore this Commission's action in Docket No. 20018 preempting non-federal technical standards with respect to systems not operating or certified by January 1, 1975. On December 31, 1974, CCT released an Opinion and Order Amending Part 596 of the Commission's Rules [technical standards]. This order made several modifications in the previously adopted technical standards. It also made specific reference to the Commission's action in Docket No. 20018. Nonetheless, no provision was made in the various modifications adopted to exempt systems that were not operational or certified as of January 1, 1975, as would be necessary to comply with Docket No. 20018.

With respect to CCT's reservation of its "right" to challenge the legality of Section 76.31(b), it is questionable whether any such right exists. Judicial review of Section 76.31(b) would be governed by 47 U.S.C. §402(a) which cross-references to the Judicial Review Act of 1950, 28 U.S.C. §§2341 et. seq. Section 2344 prescribes a time limit of 60 days in which to file a petition for review. More than three years have elapsed since the adoption of Section 76.31(b) of the Rules. Indeed, more than 60 days have elapsed since the Commission's most recent action in this area, i. e. Reconsideration of Clarification of Cable Television Rules, FCC 74-1278, 32 RR 2d 1 (released December 5, 1974). The Association is not aware that CCT has at any time sought judicial review of Section 76.31(b) in accordance with the Judicial Review Act. It is evident that CCT is time barred from asserting any "right" to such review at this time.

It should also be noted that CCT has not participated in any proceeding with respect to the adoption or clarification of Section 76.31(b). To the extent that there was any uncertainty as to the impact of Section 76.31(b), this was resolved in the Commission's Clarification of Cable Television Rules and Notice of Proposed Rule Making and Inquiry, 46 FCC 2d 175, 29 RR 2d 1621 (1974) (hereinafter called Clarification). No petition for reconsideration was filed by CCT attacking the Commission's actions regarding Section 76.31(b) in any respect nor was any appeal of those actions sought. CCT is clearly barred from collaterally attacking the legality of Section 76.31(b) in this proceeding or any appeal here from. See, e.g., Refund of Fees, FCC 75-70, 32 RR 2d 789 (1975), Home Box Office, Inc., FCC 75-152 at para. 9 (1975).

With respect to the merits of CCT's petition, it is suggested that Section 817 is inconsistent with Section 76.31(b) of the Rules since it is assessed against gross receipts rather than gross subscriber revenues. The Commission made clear in paragraph 95 of the Clarification that the term gross subscriber revenues includes:

"only those revenues derived from the supplying of regular subscriber service, that is, the installation fees, disconnect and reconnect fees, and fees for regular cable benefits...It does not include revenues derived from per-program or per-channel charges, leased channel revenues, advertising revenues, or any other income derived from the system."

The Commission further explained in paragraph 96 of the Clarification that its policy in this regard was designed to promote the development of auxiliary cable services by freeing any funds possible to support such services.

The policy expressed in the Clarification merely reaffirmed previous Commission interpretations of the Rules. Signal Master, Inc., 44 FCC 2d 860, 29 RR 2d 221 (1973); West Hawaii Cable Vision, Ltd., 46 FCC 2d 716, 30 RR 2d 215 (1974). The Commission has continued to consistently apply this prohibition against fees based on gross receipts. Karlen Communications, Inc., 49 FCC 2d 77, 31 RR 2d 986 (1974); TelePrompTer of Mountlake Terrace, Inc., FCC 75-107 (1975).

The only instance in which this Commission approved a gross receipts fee involved a tax imposed on various public utilities by the State of Connecticut. Coastal Cable TV Co., 47 FCC 2d 877, 30 RR 2d 1325 (1974). Because that tax was imposed in lieu of property taxes, the Commission found that it served to lighten the tax burden on cable systems. In addition, there was no local franchise fee involved since cable television systems are franchised on a statewide basis. The Commission found that the actual franchise fee involved amounted to about .72%. This case clearly fails to justify the New York tax which is imposed in addition to local fees and real property taxes.

In justifying the fee imposed by Section 817, CCT contends that the fee should be approved because the proceeds are used to defray CCT's regulatory expenses. However, this fact does not serve to justify a fee based on gross receipts, as is evident from West Hawaii Cable Vision, Ltd., supra. The fee involved in that case also was used to defray the costs of a state regulatory agency.

CCT's contention in this regard is further questionable in view of the now pending rulemaking proceeding in Docket No. 20272 concerning excessive and duplicative three-tier regulation of cable television. CCT is a prime example of the type of regulation at issue in that proceeding. It would be an anomolous result for the Commission to approve the fee at issue here on the basis of the mere assertion that it is used to defray regulatory expenses when the Commission is attempting to ascertain in another proceeding whether that regulation itself is justifiable.

CCT next attempts to justify the fee on the basis of language contained in paragraph 98 of the Clarification regarding fees stated in terms other than gross subscriber revenues. This paragraph must, however, be read in context with the preceeding paragraphs 95 and 96 discussed above. It is difficult to believe that having clearly prohibited fees based on gross receipts in paragraphs 95 and 96, the Commission went on to permit such fees in paragraph 98.

Paragraph 98 is further inapplicable to this situation since it is impossible to translate "gross receipts" into "gross subscriber revenues".

- This was clearly indicated in West Hawaii Cable Vision, Ltd., supra, at paragraph 6, where the Commission stated:

"Furthermore, while reasonable projections permit a fairly accurate estimate of subscriber revenues, amounts derived from auxiliary services are unknown. No system or franchising authority can predict what revenues may be earned from such services. A fortiori it is equally impossible at this time to justify a local regulatory program financed by a percentage of revenues unknown."

The Commission recognized in paragraph 96 of the Clarification that revenues from auxiliary cable services may in the future constitute "the bulk of a cable system's receipts." It is thus evident that a fee of 1% of gross receipts may exceed the Commission's limitation as stated in terms of gross subscriber revenues.

The taxation of auxiliary cable services is particularly burdensome in New York State. New York is a principal area for the development of pay cable services. Home Box Office, Inc., operates a pay cable network serving a number of New York communities. At present, these include cable systems serving the following fifteen communities and in some cases smaller surrounding communities served by the same operator: Amsterdam, Babylon, Beacon, Brookhaven, Corning, Endicott, Haverstraw, Hicksville, Islip, Ithaca, Manhattan, Olean, Oneonta, Peekskill and Vestal. It is clear, therefore, that many cable operators are presently deriving significant revenues from areas not included in the definition of "gross subscriber revenues" and that this is likely to increase in the near future. To permit state taxation of these revenues could have an adverse effect on the development of this new service, especially in view of some of the difficulties involved in commencing it including costs involved in providing necessary subscriber reception devices and in some areas widespread pirating of this service by the use of privately acquired reception devices.

State taxation of pay cable revenues is further unjustified since the Commission has substantially preempted state and local regulation in this area.

Most particularly, in paragraphs 84 and 85 of the Clarification, this Commission makes clear that local authorities may not regulate rates charged for pay cable. This policy would be defeated if such authorities are now permitted to limit by a gross receipts tax revenues they could not limit by regulation. Furthermore, it is inappropriate to permit local authorities to assess revenues derived from services they are effectively precluded from regulating in view of the Commission's policy that franchise fees should be related to the cost of regulation actually provided.

Other auxiliary services such as advertising supported local origination are also relatively widespread in New York State. Because New York State includes the nation's largest metropolitan area, it is reasonable to expect that New York cable operators will in the future be early experimenters with other auxiliary services. A fee premised on gross receipts is accordingly particularly inappropriate with respect to New York State.

CCT further attempts to justify its fee because "in the normal course of events" the fee is based on the Commission's expenses rather than the industry's receipts. However, it concedes that "gross annual receipts" becomes relevant where the CCT's expenses cannot be recovered in full because of the one percent limitation. In point of fact, however, there is no reasonable basis to suppose that CCT's budget will fall below one percent of the industry's gross receipts in the foreseeable future. CCT General Order No. 4, issued February 25, 1974, estimated the gross receipts of cable

television companies in New York at \$32,000,000 for 1972. One percent of this is \$320,000. The proposed CCT budget for fiscal 1975-76 as set forth in the New York Executive Budget is \$750,000. Section 817 authorizes CCT to include not only this cost but outstanding costs from the previous fiscal year in assessing its fee.

It is thus evident that CCT's costs are unlikely to drop below the one percent level. The Commission has previously recognized the high cost of state cable regulation in its Notice of Proposed Rulemaking and Inquiry in Docket No. 20272, FCC 74-1310 at para. 16 (1974). Even if CCT's costs did fall below that level, the fee would nonetheless be assessed on the basis of gross annual receipts pursuant to the formula set forth in Section 817(2)(ii).

CCT next relies on the Commission decision in Metro Cable, Inc., FCC 74-1294, 32 RR 2d 57 (1974). This case fails to justify the New York fee since the Minnesota fee was assessed on the basis of gross subscriber revenues rather than gross receipts. Metro Cable clearly does not establish the principle urged by CCT -- that any fee assessed only to recover regulatory expenses is per se justified.

CCT finally urges that the New York fee may be considered without reference to local fees imposed by New York municipalities because of the provisions of Section 818 of the New York Statute. The language of Section 818 authorizes municipalities to impose a fee so that the local fee when added to the state fee does not exceed "applicable federal law, rules or regulations."

However, the impact of this provision remains unclear. It has not been subject to any interpretation by courts or by CCT at this time. It is not clear, for instance, whether a cable operator in New York could automatically reduce local franchise fee payments required by a franchise to a level so that the local fee plus the state fee equalled three percent of gross subscriber revenues. This problem is compounded since the fee imposed by Section 817 clearly does not enjoy any grandfather rights under this Commission's Rules. The effective date of Section 817 was May 24, 1972.

As a practical matter, cable operators in New York are at present paying the state fee in addition to any prescribed local fee. At this time, a cable operator could unilaterally reduce his local fee payments only at his own risk. It would be clearly inappropriate for this Commission to rely upon Section 818 as an assurance of compliance with Section 76.31(b).

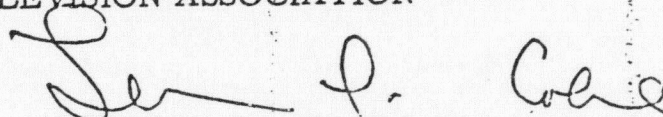
Section 818 in any event fails to deal with the central problem with respect to the state fee -- that it is assessed against the gross receipts of cable television companies. In view of this fact, it is virtually impossible to assess whether a given local franchise fee plus the state fee is within applicable federal regulations since the effect of the gross receipts fee cannot be reliably predicted.

On the basis of the foregoing it must be concluded that Section 817 of the New York State Executive Law is inconsistent with Section 76.31(b) of the Rules.

Respectfully submitted,

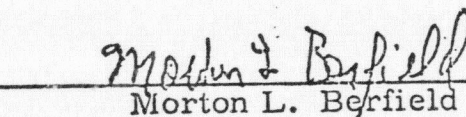
NEW YORK STATE CABLE
TELEVISION ASSOCIATION

By



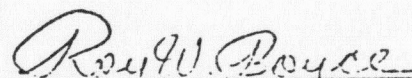
Lewis I. Cohen

By



Morton L. Berfield

By



Roy W. Boyce

COHEN AND BERFIELD
Its Attorneys

1129 - 20th Street, N.W.
Washington, D.C. 20036

February 24, 1975

gross annual receipts, would exceed the three to five percent of gross subscriber revenues limitation in the federal regulation.

Although we have shown (1) that the plaintiff is not subject to the Federal Communications Commission regulation it relies upon and (2) that in any event the regulation is not inconsistent with Section 817 of the Executive Law, it should be emphasized that if the regulation were applicable to plaintiff and if it were in conflict with Section 817, the Federal Communications Commission regulation, not the New York statute, must fall. In this regard, we note that the Federal Communications Commission has no specific authority to regulate any aspect of cable television, its authority in this area having been derived from a statute concerning the regulation of over-the-air radio and television broadcasting and communication by common carrier (e.g., the telephone company).^{*} Although the Supreme Court has upheld certain limited regulatory requirements imposed on cable television companies by the Federal Communications Commission, it has neither upheld any attempt by the Federal Communications Commission to pre-empt state regulation of cable television nor stricken down any state-imposed requirements on any pre-emptive theory. Indeed, the Court's

^{*} 47 U. S. C. §§ 1 et seq.

opinion suggests that the Federal Communications Commission's authority in this area is very limited.

In United States v. Southwestern Cable Company, 392 U. S. 157 (1968), the Court upheld a Federal Communications Commission order prohibiting the carriage of certain television broadcast signals by a cable television company in San Diego, California. In upholding this order, the Supreme Court carefully noted that the Commission's authority "is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting...We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes." (392 U. S. at 178). In United States v. Midwest Video Corp., 406 U. S. 649 (1972), the Court, by a 5-4 decision, upheld a Federal Communications Commission rule requiring local programming by cable companies but again explained that the Commission's authority to impose such a requirement was based upon its jurisdiction over television broadcasting (406 at 663). Chief Justice Burger, who cast the decisive vote, indicated that in his opinion, the Federal Communications Commission's position

"...strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts." (406 at 676).

In view of the Supreme Court's analysis in the above mentioned cases, we seriously question the statutory basis for imposition of the Federal Communications Commission regulation relied upon by the plaintiff.

CERTIFICATE OF SERVICE

I, Cynthia K. Gibson, a secretary in the law offices of Cohen and Berfield, Washington, D. C., hereby certify that on the 24th day of February, 1975, I sent by U. S. mail, postage prepaid, a complete copy of the foregoing "Response To Petition For Declaratory Ruling" to the following:

Joel Yohalem, Esquire
Counsel for New York State
Commission on Cable Television
Alfred E. Smith Office Building
Albany, New York 12225

Cynthia K. Gibson

Cynthia K. Gibson

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

RECEIVED
APR 3 1975

In the Matter of)
)
Petition For Declaratory Ruling to Declare)
§817 of the New York State Executive Law)
Consistent with 76.31(b) of the Cable)
Television Rules)

CSR-654

6218-12
07-11
4-3-75

TO: The Commission

MOTION TO CONSOLIDATE

The New York State Cable Television Association (the Association),
by its attorneys, hereby moves that the above-captioned proceeding be
consolidated with the pending proceeding in Docket No. 20272 regarding
excessive and duplicative three-tier regulation of cable television.

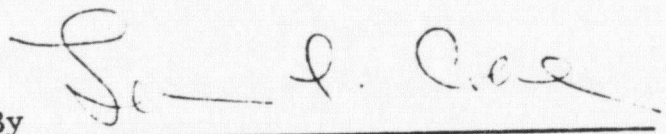
This proceeding concerns a state cable television fee that is assessed
by the State of New York to support the type of regulatory structure that is
under consideration in Docket No. 20272. The New York State Commission
on Cable Television (CCT) is asking in this proceeding that the Commission
approve a fee structure that departs from that ordinarily permitted and which
will in many instances result in combined state and local fees which exceed
the three percent of gross subscriber revenues that is permitted by the Rules
without a special showing. It would be clearly inappropriate to grant the relief
sought by CCT without considering the justification for the regulatory structure

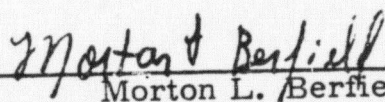
the fee is used to support. That regulatory structure is presently being fully considered in Docket No. 20272.

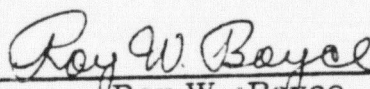
Because of the substantial interrelationship of the issues in this proceeding and Docket No. 20272, it is urged that it is most appropriate to consolidate the two proceedings to permit full consideration of all pertinent issues at one time. It would be anomalous if the Commission were to approve the fee at issue in this proceeding and subsequently find the regulatory structure it supports inconsistent with the public interest in Docket No. 20272.

Respectfully submitted,

NEW YORK STATE CABLE TELEVISION
ASSOCIATION

By 
Lewis I. Cohen

By 
Morton L. Berfield

By 
Roy W. Boyce

COHEN AND BERFIELD
Its Attorneys

1129 - 20th Street, N.W.
Washington, D.C. 20036

April 3, 1975

CERTIFICATE OF SERVICE

I, Cynthia Gibson, a secretary in the law offices of Cohen and Berfield, Washington, D.C., hereby certify that on the 3rd day of April, 1975, I sent by U.S. mail, postage prepaid, a complete copy of the foregoing "Motion to Consolidate" to the following:

Joel Yohalem, Esquire
Counsel for New York State
Commission on Cable Television
Alfred E. Smith Office Building
Albany, New York 12225

Cynthia Gibson
Cynthia Gibson

Before the
RECEIVED BY FCC FEDERAL COMMUNICATIONS COMMISSION
MAIL BRANCH ON Washington, D.C. 20554

APR 24 1975

CABLE
TV BUREAU

APR 25 1975

In the Matter of)
)
Assessments for Regulatory Expenses)
by the New York State Commission on)
Cable Television)
)
To the Commission:)

CSR-654

6218-15
08214
4-24-75

OPPOSITION OF THE NEW YORK STATE COMMISSION
ON CABLE TELEVISION TO MOTION TO CONSOLIDATE

By motion dated April 3, 1975, the New York State Cable Television Association seeks an order consolidating the instant proceeding (which involves a request for an interpretation of the franchise fee provisions in Section 76.31(b) of the Commission's rules) with the rulemaking and inquiry at Docket No. 20272 (which concerns the allocation of regulatory jurisdiction among federal, state and local authorities). The Association argues that there is a "substantial interrelationship of the issues in this proceeding and Docket No. 20272" and that "[i]t would be anomalous if the Commission were to approve the fee at issue in this proceeding and subsequently find the regulatory structure it supports inconsistent with the public interest in Docket No. 20272."

We disagree with the conclusory arguments advanced by the Association, and we urge that the motion to consolidate be denied. As we demonstrated in our petition and our reply in this proceeding, Section 76.31(b) of the rules--assuming it is applicable at all to state fees such as the reimbursements authorized by Section 817 of the New York State Executive Law--plainly contemplates that non-federal regulatory authorities will be allowed to recover their regulatory expenses. The Association apparently concedes this point and is merely seeking to avoid its consequences by suggesting that the Commission forestall its ruling in this proceeding until it has resolved the extremely complicated and only recently formulated issues in Docket No. 20272.

In arguing that our petition for a declaratory ruling concerning Section 76.31(b) of the rules is "substantially interrelated" with the proceedings in Docket No. 20272, the Association ignores that Section 76.31(b) has never been read as expressing or implying any limitation whatsoever on the scope of non-federal regulatory programs.* We acknowledge the possibility that--at the conclusion of the proceedings in Docket No. 20272, or at some other time--the Commission may wish to amend Section 76.31(b) of the rules. However,

* To the contrary, one of the principal problems the Commission has faced in applying Section 76.31(b) has been whether the non-federal program was broad enough to warrant a fee in excess of three percent. See, Clarification of Rules etc., April 17, 1974, paras. 101-106.

- 3 -

as we have argued in our papers in this proceeding, Section 817 of the New York statute is consistent with the letter and spirit of Section 76.31(b) as it now exists. Accordingly, the New York Commission is entitled to the declaratory relief it seeks. The mere possibility that the rule in question may be modified in the future hardly justifies the argument that the present rule should be left uninterpreted.

Respectfully submitted,

NEW YORK STATE COMMISSION
ON CABLE TELEVISION

By:

Joel Yohalem
Counsel to the Commission
A.E. Smith State Office Bldg.
Albany, New York 12225
(518) 474-1359

Albany, New York
April 22, 1975

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day mailed a copy of the attached opposition, first class postage prepaid, to:

Lewis I. Cohen, Esq.
Cohen and Berfield
1129-20th Street, N.W.
Washington, D.C. 20036

/s/ Joel Yohalem
Joel Yohalem

Albany, New York
April 22, 1975

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

RECEIVED

JUN 9 - 1975

F. C. C.
OFFICE OF THE SECRETARY

In the Matter of)

Petition for Declaratory Ruling to Declare)
§817 of the New York State Executive Law)
Consistent with 76.31(b) of the Cable Tele-)
vision Rules)

CSR-654

To: The Commission

SUPPLEMENT TO RESPONSE TO
PETITION FOR DECLARATORY RULING

The New York State Cable Television Association (the Association), by its attorneys, hereby supplements its response to the above-referenced Petition for Declaratory Ruling filed by the New York State Commission on Cable Television (CCT). This supplement is made necessary by several recent developments directly related to the subject matter of this proceeding.

I. Introduction: Recent Developments

One such development is that, despite the pendency of this proceeding, CCT recently commenced legal proceedings in the New York State courts against several members of the Association for the purpose of collecting a percentage of pay cable revenues received by such companies. This is directly inconsistent with CCT's action in

submitting the instant Petition which implicitly recognized that the fee imposed by Section 817 of the Executive Law of New York is questionable under the Rules of this Commission. CCT's subsequent action in commencing lawsuits based upon this provision further highlights CCT's basic disregard for this Commission's regulatory structure.

A further development of significance is the Commission's First Report and Order in Docket No. 19554, FCC 75-369, released April 5, 1975. At paragraphs 216-217 of this document, the Commission again made unmistakably clear its total pre-emption of the regulation of pay cable. This action is clearly pertinent to the issues in this proceeding as will be discussed hereafter.

Another development is the likelihood that pay cable will expand substantially in New York State in the near future. Home Box Office, Inc., a major supplier of pay cable programming, recently announced its intention to deliver its programming via satellite, a development that will make possible the provision of pay cable service in areas of the state not accessible from existing microwave facilities. In addition, several New York cable operators have announced plans to commence pay cable service in the near future on systems serving a substantial number of New York cable subscribers. These developments highlight the fact that the fee assessed against pay cable revenues by CCT has a major and immediate adverse effect on the ability of cable

operators to effectuate the federal regulatory objectives embodied in this Commission's preemption of pay cable regulation.

The foregoing facts have resulted in an increased concern on the part of the members of the Association concerning the issues raised by the fee which is the subject of this proceeding. This concern is particularly strong in view of the inconsistent action by this Commission in restating its total preemption of the area of pay cable regulation and CCT's action in commencing lawsuits designed to attach revenues from this service.

II. Section 817 of the New York Executive Law Contravenes Section 76.31(b) of the Commission's Rules by Imposing a State Fee Upon "Gross Receipts" Including Pay Television Revenues Instead of "Subscriber Revenues"

It is evident that the Commission must directly confront the stark inconsistency between Section 817's applicability to "gross receipts" and the federally imposed limitation of the taxable base for fees to "subscriber revenues." The Commission could not have been clearer that fees were not to be assessed on any base other than "gross subscriber revenues":

The term "gross subscriber revenues" is meant to include only those revenues derived from the supplying of regular subscriber services, that is, the installation fees, disconnect and reconnect fees, and fees for regular cable benefits including the transmission of broadcast signals and access and

origination channels if any. It does not include revenues derived from per-program or per-channel charges, leased channel revenues, advertising revenues, or any other revenues derived from the system. [Clarification of the Rules, 46 FCC 2d 176 (1974), emphasis added.]

Yet in basing its fees upon "gross receipts" -- and in instituting litigation to enforce its fee structure -- CCT apparently intends to collect revenues from pay television revenues.

Such a regulatory determination by New York State to assess fees on pay television revenues is simply untenable. CCT concedes that "the New York statute permits nothing more than the recoupment of petitioner's legitimate regulatory expenses." (Petition at 5.) Yet, under federal law, all non-federal regulation of pay television has been preempted; and the New York State Commission can, therefore, incur no "legitimate regulatory expenses" with respect to pay television.

First Report and Order in Docket No. 19554, FCC 75-369, released April 4, 1974 at JJ216-217. Fees assessed on pay revenues, therefore, must be strictly precluded.

The burdensome nature of this assessment is further highlighted by the anomalous situation created by the existence of both state and local fees.

III. Section 76.31(b) Limits Combined State and Local Fees
(Whether or Not Grandfathered) to Federally Prescribed
Levels

At least until the adoption of the Clarification of Cable Rules released April 17, 1974, 46 FCC 2d 176 (1974), there existed substantial uncertainty as to the applicability of Section 76.31(b) of the Rules to the imposition upon a single cable operator of state and local fees which, when combined together, exceed the 3% and 5% levels recognized, respectively in Section 76.31(b) as prima facie reasonable and the absolute maximum amount assessable. In its April 17, 1974, Order, however, the Commission directly stated that "both local franchise fees and state fees, if any, will be added together to determine compliance with our fee limitations." 46 FCC 2d at 202. Under Section 818 of Article 28 of New York State Executive Law which establishes a state regulatory scheme for cable, moreover, combined state and local fees may "not exceed the maximum amount permitted by applicable federal law, rules or regulations."^{1/}

Despite the definitive statement of the Commission's views in

^{1/} Section 818 in its entirety provides as follows;

Nothing in this article shall be construed to limit the power of any municipality to impose upon any cable television company, a fee, tax or charge, provided that any such fee, tax or charge when added to the amount payable to the Commission pursuant to section eight hundred seventeen does not exceed the maximum amount permitted by applicable federal law, rules or regulation.

its Clarification of Cable Rules, supra, and the clear intent of the New York statute to limit nonfederal fees to the amount permissible under federal law, there has remained substantial doubt concerning the obligation of cable operators to continue paying combined state and local fees inconsistent with the provisions of Section 76.31(b) of the Rules. There is particular uncertainty with respect to the rights of those cable operators who operate under grandfathered municipal franchises and are potentially subject to nonfederal regulatory fees in excess of 3% -- or often the absolute maximum of 5% -- as a result of the addition of state fees adopted subsequent to March 31, 1972. In short, as a result of its April 17, 1974, Clarification of Rules, supra, the Commission has declared that cable operators have a right not to be burdened by state and local fees inconsistent with Section 76.31(b) but has as yet provided no procedural mechanism to secure such federally vested rights.

The failure of the Commission to reconcile or clarify a cable operator's conflicting rights and obligations under Section 76.31(b) on the one hand and state and local regulations on the other poses an increasingly acute problem for cable operators and for the Commission, in its effort to exercise federal superintendence of cable regulation. More and more states have adopted an overlay of regulation supplementing traditional municipal oversight of cable.^{2/} The new overlay of state

^{2/} Examples of such state regulatory statutes are as follows: Massachusetts--Title 22, Ch. 166A, §9, Annotated Laws of Massachusetts (1973 Supp.); Minnesota--Minnesota Statutes, 1973 Supplement, §238. 07; New Jersey--N. J. S. A. 48:5A-33.

regulation has already been recognized by the Commission as resulting in a jumble of duplicative federal, state, and local requirements which threatens the economic viability of many cable systems as a consequence of the "indirect costs" of regulation.^{3/} It has also had the more direct consequence of imposing unreasonable, excessive, and duplicative fees upon cable operators.

The general regulatory and policy problems posed by the proliferation of duplicative regulations are now, of course, being considered by the Commission in Docket 20272.^{4/} State and local fees in excess of federal requirements pose, however, a particularly grave and pressing threat to federal control of cable regulation because of the attempts by state cable agencies such as the New York State Commission to impose through litigation in state courts their own view of the interrelationship of federal and state authority over cable television.

Immediate action by the Commission is necessary and appropriate to alleviate the legal and financial dilemma in which cable operators have been placed in the face of their apparently conflicting rights and obligations under state and federal law.^{5/} Under state law, as apparently interpreted by CCT, a cable operator is obligated to pay up to 1% of "gross receipts" to the State regardless of whether the combined

3/ In the Matter of Amendment of Part 76 of the Commission's Rules and Regulations Relative to an Inquiry on the Needs for Additional Rules in the Area of Duplicative and Excessive Over-regulation of Cable Television, 49 FCC 2d 1199, 1207 (1974).

4/ Id.

5/ Cf. Telarent Leasing Corp., 45 FCC 2d 204 (1974).

state and local fees exceed the 3% to 5% levels specified in Section 76.31(b). The State further suggests that under Section 818 of New York Executive Law it is the local -- not the state fee -- which must be reduced in the event the total fees exceed federally prescribed levels. The problem is that the municipalities -- whose franchises are grandfathered -- deny the applicability of federal law to their franchise fee provisions,^{6/} at least until March 31, 1977. Under federal law, by contrast, cable operators are exempted from paying any fees assessed upon "gross receipts" and certainly from paying any fees in excess of 5%.^{7/} As to combined fees in excess of 3%, under federal cable regulations, cable operators are entitled to have local and state franchise authorities justify the fees "in the light of the planned local regulatory program."^{8/}

The unchecked imposition of state fees without guidance or direction by the Commission not only deprives cable operators of their rights under federal law but deprives cable operators of large

^{6/} The position of CCT concerning the authority of the Federal Communications Commission is far from clear. As it stated in its Petition, "[i]n filing this Petition, we reserve the right to challenge the statutory and constitutional authority for Section 76.31(b)." Petition at 5n.

^{7/} Clarification of Rules, 46 FCC 2d 175, 202; West Hawaii Cable Vision, Ltd., 46 FCC 2d 716, 718.

^{8/} Cable Television Report and Order, 36 FCC 2d 143, (1972); Clarification of Rules, 46 FCC 2d 175, 201.

sums of money needed to carry out their obligations imposed under the federal regulatory scheme.

The Petition for Declaratory Ruling filed by CCT did not fully or adequately present the legal dilemma which is posed by the combined imposition of state and local fees upon a cable operator. The question is not, as asserted by the State of New York in its petition, the reasonableness of the 1% state fee alone. (Petition of the New York State Commission at 8.) Rather it is the effect of such a fee imposed as an overlay on existing municipal franchise fees. Even assuming that New York State were to revise its fee provisions in a manner not directed to pay cable revenues, CCT has not sought in its Petition clarification of the effect under federal law of a combination of local and state fees which exceed the 3% or 5% levels specified in Section 76.31(b).

Upon its review of the applicability of Section 76.31(b) to state and municipal franchise fees, the Commission can conclude only; we submit, that any amount of state and local franchise fees combined together in excess of 5% or figured on a base other than subscriber revenues is null and void under federal law.

As noted, this problem is particularly acute with respect to grandfathered franchise fees. Because of the fact that the state enacted subsequent to March 31, 1972, an additional franchise fee that is clearly not grandfathered, local franchise fees -- whether

grandfathered or not -- also must be brought into compliance with the rules. See Clarification of the Rules, supra, at paragraph 75-76.^{9/} The absence of specific clarification of this requirement as applied to the State of New York has engendered great uncertainty.

The Commission must, therefore, clearly inform the courts of the State of New York and CCT that cable operators are under no obligation under federal law to pay in excess of 5% of subscriber revenues to state and local authorities cumulatively. The Commission must further find that, where combined state and local fees (whether or not either is grandfathered) exceed 3%, both state and local authorities must justify such fees "in light of their planned local regulatory program" before cable operators are obligated to pay such fees. In view of its concern about overlapping and duplicative regulation, the Commission should approve no non-federal regulatory fees in excess of 3% where there is evidence of redundant state and local regulation of cable.

^{9/} The Commission also suggests that where a municipality significantly amends its franchise, recertification of the franchise is necessary. This is clearly not applicable here since the change results from a state law rather than an amendment of the franchise itself. The rationale that if the community amends the franchise in one respect it must amend it in all respects is not applicable since no amendment of local franchises has occurred. Nor is any amendment necessary to conform local franchises to Section 76.31(b) in view of the provisions of Section 813 of the Executive Law.

As noted, Section 818 of the New York Executive Law specifically provides that franchise fees imposed on cable operators in the State of New York must be consistent with federal law and regulations. This embodies a clear policy of the New York legislature that fees imposed on cable operators should be consistent with federal policy.

Thus, the Association submits that there is no justification under state or federal law for leaving undisturbed municipal franchise fee provisions not in conformance with Section 76.31(b). The Commission must now require that state fees or municipal franchise fees be in full conformance with Section 76.31(b). In the event that the municipalities or the state refuse to bring their regulatory programs into accord with federal requirements, nonconforming local regulations should be declared null and void.

It is not the Association's purpose in this petition extensively to brief the question of the Commission's authority to preempt state and local regulation of cable television inconsistent with the federal regulatory scheme. In its March 19, 1975 Comments in response to the Commission's Notice of Proposed Rule Making and Inquiry in Docket No. 20272, relating to duplicative regulation of cable, the Association briefed in substantial detail the issue of whether the Commission has authority to preempt local franchise regulations inconsistent with federal requirements. No useful point is served here by a repetition of those

arguments. The Association respectfully requests that its brief in that proceeding be incorporated herein by reference.

The Commission has long held that local franchise fees must be justified in the light of the planned program of local regulation. As noted above, the FCC has authority generally to oversee and allocate regulatory responsibility between federal and non-federal authorities. Ancillary to such authority is the prerogative of the Commission to determine the amount of local franchise fees which may reasonably be payable to cable operator to enable state and local authorities to carry out such responsibilities as have been delegated to them. Federal supervision of the total amount of the state and local regulatory fees imposed on cable operators is inextricably intertwined with the Commission's ability to prevent its own federal regulatory objectives and indeed its policy of regulatory dualism from being subverted by uncoordinated, unchecked, and unilateral state action.

The members of the Association fully intend to comply with any lawful obligations imposed by state and local authorities which are upheld as consistent with the federal regulatory scheme. Until such regulatory obligations have been clarified by the Commission, cable operators are being placed in untenable positions by the Commission's failure to articulate and defend its authority to supervise the regulatory environment in which cable television develops.

The Commission must now assure that its legitimate regulatory concerns with the orderly development of cable are not undermined by unilateral actions by non-federal regulatory authorities which are inconsistent with and detrimental to the federal regulatory scheme.

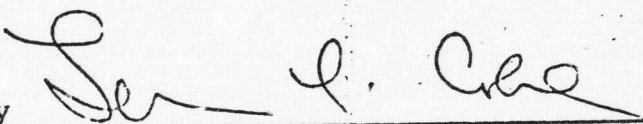
IV. Relief Requested

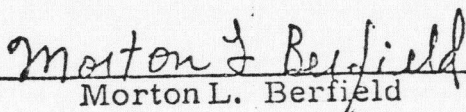
The Association accordingly urges that the Commission should declare that:

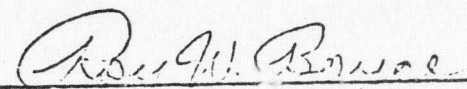
- (i) Section 817 of the New York Executive Law is null and void to the extent that the CCT interprets it to allow the collection of state fees upon "gross receipts," including especially pay TV revenues, as opposed to subscriber revenues.
- (ii) Cable operators are not obligated to pay any combined state and municipal fees (where the state fee is not grandfathered) in excess of 3% but less than 5% of subscriber revenues until or unless the state and municipality can justify such fees in light of their planned regulatory program and can demonstrate that non-federal regulation does not overlay or duplicate federal regulation.
- (iii) Cable operators are not obligated to pay any combined state and local fees which exceed 5% of subscriber revenues (where the state fee is not grandfathered).

Respectfully submitted,

NEW YORK STATE CABLE TELEVISION
ASSOCIATION

By 
Lewis I. Cohen

By 
Morton L. Berfield

By 
Roy W. Boyce

Cohen and Berfield
Its Attorneys

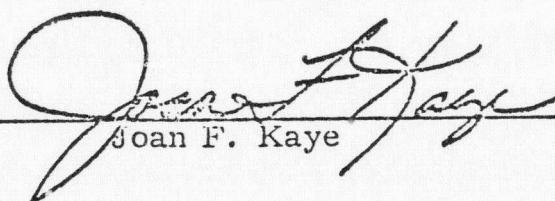
1129-20th Street, N. W.
Washington, D. C. 20036

June 9, 1975

CERTIFICATE OF SERVICE

I, Joan F. Kaye, a secretary in the law offices of Cohen and Berfield, Washington, D. C., hereby certify that on the 9th day of June, 1975, I sent by first class U.S. mail, postage prepaid, a complete copy of the foregoing "Supplement to Response to Petition for Declaratory Ruling" to the following:

Joel Yohalem, Esquire
State Commission on Cable
Television
Alfred E. Smith Office Building
Albany, New York 12225


Joan F. Kaye

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Assessments for Regulatory Expenses
by the New York State Commission on
Cable Television

CSR-654

To the Commission:

REPLY TO SUPPLEMENT TO RESPONSE TO
PETITION FOR DECLARATORY RULING

On or about August 6, 1975, the New York State Commission on Cable Television (CCT) submitted in this proceeding a Statement of Substantial Change in Information Furnished to the Commission ("Statement").* The Statement, filed pursuant to Section 1.65 of the Commission's Rules, apprised the Commission that Section 817 of the New York State Executive Law had been amended so as to increase from one to two percent of the gross annual receipts of a cable television company the maximum amount that might be recovered from such company as reimbursement of CCT's regulatory costs and expenses.

On or about August 12, 1975, the New York State Cable Television Association (the Association) filed with the Commission a Supplement to Response to Petition for Declaratory Ruling ("Supplement").

* On or about August 15, 1975, Commission staff advised CCT that it had received the response of the New York State Cable Television Association to the Statement, but had not received the Statement itself. In accordance with Commission staff's instructions, CCT thereupon submitted an additional copy of the Statement.

The Association described the Supplement as necessary in view of the amendment reported in CCT's Statement. CCT is unaware of any provision of the Commission's rules specifically authorizing the filing of the Supplement, but in the event the Supplement should be deemed part of the record in this proceeding, we believe it appropriate that we reply to certain material contentions therein.

The Association asserts that a fee of two percent of gross annual receipts will, in many instances, equal "the three percent of gross subscriber revenues maximum permitted by [Section 76.31(b) of the [Commission's] rules without a special showing."* However, the Association adduces no evidence in support of this contention. Moreover, even if it were shown that two percent of gross annual receipts were to translate into more than three percent of gross subscriber revenues, it would not follow that an assessment equal to two percent of gross annual receipts is "unreasonable" within the meaning of Section 76.31(b). In appropriate cases, a fee exceeding three percent of gross subscriber revenues may be deemed reasonable and we submit that the extensive regulatory program undertaken by CCT would warrant such a finding in this case. Finally, we stress again that Section 817 does not impose a flat franchise fee measured by gross annual receipts; rather, it provides only for recoupment of CCT's regulatory expenses subject to a "ceiling" of a specified percentage of gross annual receipts.

* Supplement, at p. 2.

We also note the Association's renewed assertion that "this state fee is in addition to substantial local fees that are typically imposed by municipalities." In reply, we simply refer once again to Section 818 of the Executive Law which makes it clear that municipal franchise fees, when added to the state fee, may not exceed any applicable federal limitation and that the state fee has priority.*

For the foregoing reasons, we continue to believe that the change described in our Statement does not materially affect the arguments advanced in our Petition and that the relief sought in our Petition remains appropriate.

Respectfully submitted,

NEW YORK STATE COMMISSION
ON CABLE TELEVISION

By:

/s/ Joel A. Linsider

Joel A. Linsider
Acting Counsel
Tower Building
Empire State Plaza
Albany, New York 12223
(518) 474-1359

Albany, New York
August 22, 1975

* Section 818 of the Executive Law provides as follows: "Nothing in this article shall be construed to limit the power of any municipality to impose upon any cable television company, a fee, tax or charge, provided that any such fee, tax or charge when added to the amount payable to the commission pursuant to section eight hundred seventeen does not exceed the maximum amount permitted by applicable federal law, rules or regulations."

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day mailed a copy of the attached Reply to Supplement to Response to Petition for Declaratory Ruling, first-class postage prepaid, to:

Lewis I. Cohen, Esq.
Cohen and Berfield
1129-20th Street, N.W.
Washington, D.C. 20036

/s/ Joel A. Linsider

Albany, New York
August 22, 1975

BEFORE THE
Federal Communications Commission
WASHINGTON, D. C.

In the Matter of)
)
Assessments for Regulatory) File No. CSR-654
Expenses by the New York State)
Commission on Cable Television)

To: The Commission

COMMENTS OF
MANHATTAN CABLE TELEVISION, INC.

Manhattan Cable Television, Inc. ("MCTV"), by
its attorneys, hereby files its comments in the above-
entitled proceeding. ^{*/}

Introduction

1. On or about January 22, 1975, the New York
State Commission on Cable Television ("CCT") petitioned
this Commission for a declaratory ruling ("Petition")
that §817 of the New York State Executive Law is con-
sistent with §76.31(b) of the Commission's cable

*/ By a letter dated March 19, 1976, the Cable Televi-
sion Bureau invited MCTV to file comments in the
instant proceeding by March 29th. The Bureau orally
granted MCTV a two (2) day extension until today,
March 31, 1976, for filing these comments. It is our
understanding that at the same time the Bureau extended
for two (2) days, until April 15, 1976, the time within
which other parties to this action may respond to
MCTV's comments.

television rules. At that time §817 imposed a one (1%) percent fee on cable systems in New York State, computed on the gross revenues of the system, which include revenues from all auxiliary services such as pay-cable and advertising. (New York State Executive Law, §817; General Orders No. 3 and 4 of CCT dated June 7, 1973 and February 25, 1974 respectively.) In August 1975, the State Legislature raised the fee to two (2%) percent of gross revenues from all sources.

2. The New York State Cable Television Association has filed comments in opposition to the Petition. After the fee was increased, both CCT and the Association filed supplemental comments.

3. In May 1975, CCT sued MCTV for failure to pay the proper assessments to CCT for the years 1973 and 1974. (New York State Commission on Cable Television v. Manhattan Cable Television, Inc., et. al., Supreme Court, Albany County, May, 1975.) In February 1976, MCTV obtained a stay of that action in the State Supreme Court, Albany County,

- 3 -

pending a determination of the Petition. In paying its State fee, MCTV had withheld revenues derived from auxiliary services. MCTV's refusal was premised upon federal preemption of fees from such services and Commission statements that neither the State nor the municipality had a right to those revenues. In granting the stay of the State action, the State Supreme Court held that, in view of the pendency of the Petition, this Commission was the proper forum to determine the validity of the CCT fee.

Summary Of Argument

4. In Point I, MCTV shows that CCT has failed to adequately justify its 2% fee. Section 76.31(b), and a number of decisions including one cited by CCT, require that CCT present detailed financial evidence to support the fee. CCT has not.

5. In Point II, MCTV argues that the Commission cannot decide the validity of the 2% fee without

determining, first, the effect of that fee plus the municipal fee upon the viability of each system in the State. The Commission has approved a number of CAC applications subsequent to January 1, 1973 without reference to any State fee. In some instances the combined fees of CCT and the local government will be above the maximum permitted under Commission regulations. In regard to grandfathered systems, such systems are locked into the municipal fees they were paying as of March 31, 1972. Approval of the Petition without a determination of the maximum aggregate amount a grandfathered system will have to pay violates 76.31(b) and prior Commission decisions.

6. In Point III, MCTV shows that, in total contravention of stated Federal policy, CCT is attempting to regulate all auxiliary services and to permit local municipalities to do the same. Approval by the Commission of the Petition will establish precedent justifying State regulation of these services.

POINT I

CCT Has Failed To Adequately
Justify its 2% Fee

7. CCT argues that the 2% fee established in Section 817 of the New York Executive Law is fully consistent with Section 76.31(b) of the Commission's rules, because the New York statute permits nothing more than the recoupment of CCT's legitimate regulatory expenses and is, therefore, "essentially self-justifying on its face". (Petition, p. 7.) However, prior Commission decisions in similar cases establish that detailed financial evidence must be presented by the applicant to justify a total State-municipal fee in excess of 3% of basic subscriber revenues. CCT has offered no financial proof whatsoever. To merely allege that the statute is self-justifying on its face is insufficient.

8. In pertinent part, Section 76.31(b) of the Commission's rules requires a franchise fee to be reasonable, "e.g., in the range of 3-5% of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as

initial lump sum payments)". If the franchise fee exceeds 3%, Section 76.31(b) requires that the reasonableness of the fee be approved by the FCC only upon a showing "that it will not interfere with the effectuation of federal regulatory goals in the field of cable television, and . . . that it is appropriate in light of the planned local regulatory program".

9. At Paragraph 185 of its Cable Television Report and Order, 36 FCC2d 143, 209 (1972), the Commission stated that it was concerned that local regulatory authorities might use franchise fees more for revenue-raising than for regulatory purposes. "[H]igh local franchise fees may burden cable television to the extent that it will be unable to carry out its part in our national communications policy." Section 76.31(b), therefore, sought to "strike a balance that permits the achievement of federal goals and at the same time allows adequate revenue to defray the costs of local regulation".

10. In its decisions, the Commission has detailed the type of information which it requires from both the cable system and the local regulatory authority to establish the

"reasonableness" of a franchise fee in excess of 3%. In Sapulpa Cable Television, 38 FCC2d 584 (1972), which concerned a sliding 4-6% franchise fee, the Commission stated that any attempted showing of reasonableness must include sufficient data to indicate (1) that the cable system can pay a larger franchise fee and maintain its other services and (2) that the expenses incurred by the franchising authority as a result of its cable television regulatory program justifies a larger fee.

11. In WKBC Cablevision, Inc., 45 FCC2d 237 (1974), it further detailed the showing which the local regulatory authority was required to make:

"Information such as the number of people who will be assigned regulatory duties, the type of duties which will be performed and the projected cost of performing those duties is necessary in order to determine the appropriateness of a franchise fee in excess of 3%." (45 FCC2d at 239.)

12. In subsequent Commission cases, the local regulatory authority has been required to submit specific data on the cost of its regulatory program, including a statement of its total projected cable regulatory budget, broken down

to show cost of salaries, employee benefits, training, travel, printing, office expenses and investigations and hearings. In addition, a projection of the total man-
hours involved has generally been required.^{*/}

^{*/} See, Hawkeye Cablevision, Inc., 46 FCC2d 555 (1974); West Hawaii Cablevision, Ltd., 46 FCC2d 716 (1974); Theta Cable of California, 47 FCC2d 123 (1974); Norman Cable TV, Inc., 48 FCC2d 1056 (1974); Birmingham Cable Communications, Inc., 52 FCC2d 1099 (1975). In the Hawkeye case, the local regulatory authority indicated that it proposed to maintain a staff of 9 full time employees to implement its regulatory program. A total of 832 hours of administrative, clerical, legal and inspection services would be required to perform the regulatory duties, at an annual cost of \$125,203. It was projected that the franchise fee paid to the regulatory authority by the cable system would generate only \$10,474 for the authority in the first year of operation. By the sixth year, it was projected that this amount would rise to a maximum of only \$124,068. Based upon that showing, the Commission indicated that the franchise fee was: "within the zone of reasonableness contemplated in the Cable Television Report and Order . . . [T]he amount derived from the 5% franchise fee will be far from enough to meet the costs of regulatory programs for the first few years of the cable system's operation; not until the sixth year of operation will the franchise fee cover the costs, and even then, the franchise fee will not exceed the costs of the regulatory program. Therefore, in view of the anticipated additional staff needed to carry out the regulatory program, and Hawkeye's statement that the fees paid will not interfere with its operations, we believe that the franchise fee showings meet the criteria of Section 76.31(b)." (46 FCC2d at 556.)

13. CCT urges that its fee is self-justifying because State law permits the fee to be nothing more than a recoupment of CCT's legitimate regulatory expenses. It relies upon the case of Metro Cable, Inc., 49 FCC2d 1133 (1974), as dispositive of this situation. In Metro Cable, which concerned a 1% fee charged by the Minnesota Commission on Cable Communications, the Commission did rely in part upon the enabling legislation passed by the Minnesota state legislature, which, similar to the New York Executive Law, required the State Cable Commission to collect monies necessary "to carry on the work of the Commission". In its decision, the FCC noted that "the State's 1% fee is essentially self-justifying on its face as a percentage of the operational costs of the Commission . . .", and held that the 1% state fee was reasonable. (49 FCC2d at 1135.)

14. In an earlier case, Clearview Cable Corporation, Inc., 49 FCC2d 485 (1974), which concerned a 2% fee charged by the New Jersey State Office of Cable Television, the Commission also had considered the legislative intent of the New Jersey state legislature "to recover only those monies expended by the State in the regulation of cable television". (49 FCC2d at 488.)

15. However, in both the Metro Cable and Clearview cases, while relying upon either the wording of the particular statute or the legislative intent to justify reasonableness of the fee, the Commission also placed strong emphasis on filings by the cable systems involved and by both State Commissions outlining their regulatory programs and detailing the costs of those programs.

16. The clear import of these cases is that the State regulatory body must submit a detailed economic justification for its fee. CCT has not submitted any financial information at all, but merely relied on statutory language. This is not sufficient to establish the reasonableness of the fee and the Petition, therefore, should be dismissed.

POINT II

The Petition Cannot Be Decided Without Evidence Of The Impact Of Municipal Fees Upon The Individual Cable Systems

17. In order to be consistent with its past decisions and its rules, the Commission cannot decide the Petition without also considering the level of fees imposed by the individual municipalities throughout New York State and the

combined expenses of both CCT and the municipalities.^{*/}

The Commission must also consider the impact of the aggregate fees on the affected cable systems.

18. CCT ignores Section 76.31(b) and innumerable decisions pursuant to it that require the participation of the cable system in any adjudication of the fees which it will be required to pay. (See the cases cited above under Point I.)^{**/} This participation is necessary because Section 76.31(b) requires that the fee, not only not exceed the costs of regulation, but also that it not adversely affect the economic viability of the cable system. The cable system is a necessary party to that investigation. To exclude the individual cable systems in New York State from this proceeding violates Section 76.31(b) and in addition deprives those systems and their municipal regulators

^{*/} Section 76.31(b) requires that any fee in excess of 3% must be justified by both the franchisee and the franchising authority or authorities.

^{**/} Both of the cases (Metro Cable and Clearview) concerning State Cable Commission fees, included evidence submitted by the cable systems themselves. In Clearview, although indicating that the State of New Jersey did not need to make separate showings in future cases, the Commission made it clear that each cable system which sought a CAC in the future would have to address the impact issue.

of their due process rights to a fair and full hearing.

19. CCT does address its failure to supply any information concerning the level and affect of the combined State/municipal fees. CCT acknowledges that the Metro Cable case, which concerned fees payable to Minnesota State Cable Commission, also carefully considered municipal fees. Both the Metro Cable and the Clearview Cable cases were brought to the Commission by the cable system affected and in both evidence was adduced as to the impact of fees on the system.

20. CCT argues, however, that the Commission can decide this Petition without considering municipal fees, since, or so CCT contends, the CCT fee is paramount.^{*/} We submit, however, that the apparent supremacy of the State fee does not obviate the necessity for considering municipal fees.

^{*/} Section 818 of the New York State executive law permits municipalities to continue to impose cable fees provided that the municipal and State cable fees do not exceed "the maximum amount permitted by applicable Federal law, rules and regulations." CCT argues that Section 818 provides for an automatic reduction in the amount of the municipal fee in the event that the combined 2% of gross revenues to the State and the municipality exceed the Commission guideline of 3% of basic fees. However, Section 818 is at best ambiguous on this point.

21. So far as we can determine, the Commission has generally ignored the existence of the CCT fee in its processing of CAC applications for cable systems in the State of New York since the effective date of the fee in January 1973. There have been a large number of CACs processed during that period.^{*/} It appears that in all but a very few instances,^{**/} none of the papers nor the CAC certificate itself mentioned the CCT fee. Apparently, then, without ever reaching the question of the impact of the CCT fee, the Commission has authorized a number of non-grandfathered cable systems to pay municipal fees that would, when combined with the CCT fee, exceed the 3% level.

^{*/} See, e.g., CAC Nos. 4173, 4251, 4308, 4420, 4854, 5364, 5445, 6101, 6137.

^{**/} We are aware of at least two cases in which the franchise stated that the fee to the municipality would be reduced by an amount that when combined with the 2% fee payable to the CCT would not exceed the Commission's guidelines. (Brookhaven Cable TV, Inc., Bellport, N. Y., CAC-5012; KWR Systems, Inc., Village of Fredonia and Town of Promfret, N. Y., CAC-6106.) In the case of Brookhaven Cable, the Commission subsequently issued a CAC apparently approving this arrangement. Even in these cases there is a remaining uncertainty. Since the Commission guidelines only set a range as a reasonable fee and do not prohibit a fee in excess of 3% if it is justified, the amount of the reduction in each case is uncertain.

22. In these cases the Commission has given its imprimatur, in the form of a CAC, to the payment of ^{*/}fixed fees to the municipalities. In most instances, in the absence of a Commission declaration directed to their specific system, the municipalities can contend that the Commission CAC requires that the cable system pay them their full fee even if that fee, when combined with the State 2%, exceeds the 3% guideline. Therefore, in deciding the Petition, the Commission must resolve the issue of the consistency of the combined total of the 2% fee and each of the municipal fees which were previously authorized following careful Commission consideration of specific applications.

23. Grandfathered systems present a similar but more difficult situation. It might be contended that, in those instances where the CAC proceeding was silent on the CCT fee, either the Commission

*/ The exceptions would be the instances, referred to above, where the franchise does provide that its fee to the municipality is to be reduced by the amount of the State fee in order to fall within the Commission's guidelines.

implicitly approved the combined fees or the cable system waived its right to raise the issue. However, these considerations do not apply to the grandfathered situation.

24. There was no CCT fee at the time that the grandfathered systems received franchises providing for set fees to the municipalities. Section 76.31(b) of the Commission's rules expressly states that the franchise fee for a system which commenced operation prior to March 31, 1972, such as MCTV, is grandfathered until March 1977. In many instances the grandfathered fee to the municipality alone exceeds the 3% guideline. For instance the MCTV fee is 5% of gross revenues. In these instances, there is a specific Commission rule that in effect requires continued payment of the 5% fee to the municipality until March 31, 1977. Again, then, in acting upon the Petition, the Commission must consider and resolve the issue of the consistency of the aggregate total of each of these grandfathered fees and the CCT fee with Commission guidelines.

25. In the case of grandfathered cable systems, the CCT Petition creates an additional difficulty. The CCT

fee was not grandfathered since it was not enacted until after the grandfather date. In those instances where the combined fee exceeds 3%, CCT should not have been collecting any fees since its creation. If the FCC grants the CCT Petition, it would have the effect of retroactively approving the situation without examining the justification of the combined fee. This would contravene innumerable Commission decisions.

26. Where the full fees have already been paid to both the municipality and to CCT, it may be difficult for a grandfathered cable system to obtain reimbursement from CCT. However, where, as in the case of MCTV, part of the CCT fee has not been paid, the effect of FCC approval of the Petition, in conjunction with the supremacy provision of Section 818 of the Executive Law and the fact that MCTV has already paid New York City, apparently would be to require MCTV to remit additional monies to CCT. MCTV would then be retroactively required to pay 7% of gross revenues, which is far more than the 3-5% of basic subscriber revenues deemed reasonable without detailed justification. At the least, the Commission should not take this action without

careful consideration and without a review of both municipal and State regulatory programs and the impact on MCTV.^{*/}

27. We submit that the proper procedure is to require CCT to file a new Petition directed to each grandfathered system where the combined fees exceed 3% of basic revenues and then to solicit evidence concerning expenses from both the municipality and the State and evidence of the impact upon the cable system from the cable system itself.

POINT III

Commission Policy Clearly Prohibits
CCT From Imposing A Fee On
The Revenues Received By
MCTV From Auxiliary Services

28. In its Notice of Proposed Rule Making and Inquiry released April 17, 1974, 46 FCC2d 175 ("FCC Clarification"), the Commission clearly and unequivocally pre-empted the regulation of the rates of auxiliary services provided by

^{*/} We have attached an exhibit showing the aggregate taxes and fees that have been assessed, or are threatened, against MCTV. The total amounts to an effective 21.4% of MCTV's gross revenues, a staggering amount.

cable systems. (FCC Clarification, ¶s 84, 85.) The Commission also clearly limited the source of dollars that cable systems could use to pay revenues to municipalities under §76.31(b) of its Rules. The Commission limited fees paid to local authorities to only those fees based upon basic subscriber revenues. It defined such revenues to mean:

"...only those revenues derived from the supplying of regular subscriber service, that is, the installation fees, disconnect and reconnect fees, and fees for regular cable benefits including the transmission of broadcast signals and access and origination channels, if any. It does not include revenues derived from per-program or per-channel charges, leased channel revenues, or any other income derived from the system."
(Id. ¶95) (emphasis supplied)

The Commission then applied the exact same limitation to the sources of dollars from which a State regulatory body could extract fees (Id. ¶99).^{*/}

^{*/} The FCC and its Cable Television Bureau have repeatedly affirmed this pre-emption. See, e.g., letter to Lawrence Flinn, Jr., President, Pioneer Cablevision Corp., from David D. Kinley, Cable Television Bureau, July 22, 1974; letter to John W. Park, Esq., Department of Law, City of Binghamton, from Stephen R. Effros, Cable Television Bureau, June 2, 1975.

29. The 2% fee which CCT seeks to impose on MCTV is in direct contravention of this policy because CCT is seeking, in effect, to tax all dollars derived from auxiliary revenues. CCT argues (Petition, p. 7) that the 2% fee is not measured by the gross revenues of the cable industry, but rather by its own costs and expenses. While true, this fact is irrelevant. Once the amount of the State's expenses have been determined and then the level of the fee set,^{*/} the fees for each cable system are established. Those fees are in fact based upon each system's gross revenues, including revenues from auxiliary services. Whether the amount of the 2% fee is justified by CCT's expenses is irrelevant to the critical issue of what dollars MCTV must use to pay such amount.

30. CCT contends that it does not matter how its 2% fee is measured. It urges that, as long as the total fees paid to both the State and municipalities within New

^{*/} Because of the size of the State Cable Commission, its expenses have always been so high that the maximum level, formerly 1%, now 2%, has always been exceeded. For all practical purposes then, the CCT fee has always been the maximum allowable.

York State do not exceed the level of 3 to 5% of revenues from basic service only, the FCC's pre-emption of fees from pay revenues has not been violated. (Petition, p. 8.) It relies for support upon ¶98 of the FCC Clarification which states, in essence, that, no matter what label is attached to a fee, the Commission will attempt to translate that fee into a percentage of gross subscriber revenues in order to determine if it complies with §76.31(b).

31. However, ¶98 was not intended to support CCT's argument. It was addressed to a situation where a franchising authority based some payments upon a flat amount such as filing fees or those collected upon grant of the franchise. The Commission could not have intended to undermine indirectly by ¶98 its clear pre-emption in ¶95.

32. Furthermore, the difficulty with this argument in the instant case is that, no matter how the 2% fee is translated, the result is to permit CCT to have jurisdiction over auxiliary dollars. The FCC Clarification is unequivocal that neither municipalities nor other regulatory

bodies are entitled to dollars earned from these services. The reasoning for such prohibition, also clearly and firmly stated, is that these dollars

"...are best used to support the development of these experimental and largely unprofitable services. We encourage experimentation in ancillary services. Any funds that can be freed to support those services will ultimately benefit the community of the system and aid our efforts at seeing those services develop nationwide." (FCC Clarification, 196.)

33. Acceptance of the CCT reasoning weakens the federal pre-emption. It will create the initial precedent CCT needs to force diversion of auxiliary dollars into subsidization of basic service, thereby thwarting the Commission concept of using auxiliary revenues to develop new auxiliary services for a national communications system.

34. That this is the ultimate intention of CCT is shown by its Clarification of Commission Policy ("CCT Clarification") issued March 1, 1976, regarding local regulation of auxiliary rates. The CCT Clarification permits municipalities to regulate auxiliary rates and services by including

them in the franchise, prohibits changes in the rates without cumbersome amendment proceedings and grants ultimate control and supervision of the rates and services to CCT. One paragraph of the CCT Clarification is worth quoting in its entirety because it conclusively demonstrates the attempt by CCT to force a pooling of auxiliary revenues with basic revenues in opposition to stated federal policy.

"Not only do we fail to agree with the legality of the FCC's pre-emptive policy; we also question its wisdom. An examination of rate structures and developments in the establishment of subscriber rates has made it evident that a complicated nexus exists between those rates charged for 'regular' cable services and those charges for 'auxiliary' services. Municipalities are still unsure as to their jurisdiction concerning 'pay-cable'. Moreover, clear instances of abuse resulting from this uncertainty have become evident, as cited above. If the present trend continues, municipalities will have less and less control over subscriber rates as the result of unilateral increases in the premium programming rate rather than the basis rate. For practical purposes, neither the locality nor the State would have control over the price subscribers pay for any cable television services." (CCT Clarification, p. 6.) (emphasis supplied.)

35. CCT's Petition to the Commission cannot properly be understood without reference to its Clarification. The position reflected by the CCT Clarification is a logical extension of the position urged in the Petition.

36. If the Commission adopts the arguments advanced in the Petition, and permits CCT to obtain auxiliary dollars as fees, it may be difficult for the Commission to prevent CCT from regulating auxiliary rates. For instance, the Petition (pp. 6-7) argues in essence that the Commission should not distinguish between fees from regular subscriber services and those from auxiliary services. This is the same commingling argument used in the CCT Clarification quote set forth above. Furthermore, the basic arguments used by this Commission in support of pre-emption of fee and rate regulation are similar. Thus, the precedent of giving CCT access to auxiliary dollars could be used to support CCT's regulation of all auxiliary services under the CCT Clarification. Pre-emption would be destroyed, not by a direct frontal assault, but by an indirect attack on isolated sides of the doctrine.

37. Auxiliary services are in their infancy. Investment capital to develop them is difficult to attract. One important benefit of pre-emption has been the ability of the cable system to assure the investor that auxiliary dollars will be used for auxiliary services. This permits investors and others to project reliably and confidently the economic viability of particular cable service. However, when such assurance can no longer be given, and auxiliary dollars may have to be used to subsidize regular service, investor enthusiasm will be severely dampened.

38. The legislative mandate given to CCT is to foster the growth and development of cable in the State. Both the Petition and CCT Clarification have a regressive effect on the development of auxiliary services. If the Commission accepts the Petition, it will be difficult for the Commission to reject the CCT broad-scale regulation of pay cable presaged by the CCT Clarification. Acceptance of the Petition's arguments will undermine the free-market concept

for auxiliary services which the Commission has previously supported and will lend federal sanction to a repressive atmosphere for cable development in New York State.

WHEREFORE, for all of the foregoing reasons, the CCT Petition should be denied.

Respectfully submitted,

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Manhattan Cable Television
1975 Taxes and Fees as Assessed

	<u>Amount</u>	<u>% of Revenues</u> <u>\$9,088,000</u>
<u>New York City</u>		
Franchise Fees	\$ 511,000	5.6%
Ad Valorem Taxes	1,092,000	12.0%
Income Tax	12,000	.1%
Occupancy Tax	14,000	.2%
Vehicle Tax	2,000	---
Total	<u>\$1,631,000</u>	<u>17.9%</u>
 <u>New York State</u>		
State Cable Commission ¹	\$ 116,000	1.3%
Income Tax	26,000	.3%
Total	<u>\$ 142,000</u>	<u>1.6%</u>
 Grand Total	 <u><u>\$1,773,000</u></u>	 <u><u>19.5%</u></u>

1. Although the assessment is 2% of gross receipts the actual payment in any year may be a smaller percentage of that years revenues because the payment for each fiscal year beginning April 1 is based on the revenues of the preceding year.

Manhattan Cable Television

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1976 Estimated Taxes and Fees as Assessed

	<u>Amount</u>	<u>% of Revenues</u> <u>\$13,800,000¹</u>
<u>New York City</u>		
Franchise Fee	\$ 740,000	5.4%
Ad Valorem Taxes ²	1,160,000	8.4%
Sales Tax ¹	400,000	2.9%
Income Tax	15,000	.1%
Occupancy Tax	14,000	.1%
Vehicle Tax	2,000	---
Total	<u>\$2,331,000</u>	<u>16.9%</u>
 <u>New York State</u>		
State Cable Commission ³	190,000	1.4%
Sales Tax ¹	400,000	2.9%
Income Tax	25,000	.2%
Total	<u>\$ 615,000</u>	<u>4.5%</u>
 Grand Total	<u><u>\$2,946,000</u></u>	<u><u>21.4%</u></u>

1. Revenues include 8% sales tax of gross receipts payable to State and City beginning May 1, 1976.
2. Assumes tax rate increases by 10% for fiscal 1976-1977.
3. Although the assessment is 2% of gross receipts the actual payment in any year may be a smaller percentage of that years revenues because the payment for each fiscal year beginning April 1 is based on the revenues of the preceding year.

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 1976, I forwarded by United States regular mail, postage prepaid, copies of the foregoing "Comments of Manhattan Cable Television, Inc." in FCC proceeding CSR-654 to:

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